Supreme Court, U.S.
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No. _____

UNITED STATES SUPREME COURT

October 1992 TERM

DIANA M. MAULDING Petitioner

v.

LOUIS W. SULLIVAN, Secretary of Department of Health and Human Services; DEPARTMENT OF HEALTH AND HUMAN SERVICES Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner
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QUESTIONS PRESENTED FOR REVIEW

1. When conducting a judicial review of a decision of the Merit Systems Protection Board, should the reviewing court apply the standards set forth in 5 U.S.C. Sec. 7703(c) to the employing agency's actions or should the standard in 5 U.S.C. Sec. 7703(c) be applied to the Merit System Protection Board's final decision?

2. Can a court judicially reviewing a final Merit Systems Protection Board decision ignore credibility based findings of fact made by the MSPB administrative law judge?

3. When applying the rules set forth in 29 C.F.R. Sec. 1613.701 et seq. to a federal employee claiming handicapping discrim- ination, can the trial court choose among the criteria described disjunctively, some of which would prevent recovery for the employee and some of which would allow recovery for the

employee, or must the trial court use the disjunctively presented criteria in such a way that if the employee fit one of the disjunctively described criteria, judgment should be for the employee?

4. Must the Court of Appeals address all issues appealed to it in the Court of Appeals' opinion?

PARTIES

Same as captioned.

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HISTORY OF OPINIONS IN THIS CASE

January 18, 1989: Petitioner prevailed after a hearing in front of Merit Systems Protection Board administrative law judge.

December 18, 1989: Petitioner does not prevail after the full Merit Systems Protection Board reviewed the file.

July 1, 1991: Petitioner loses on all claims after the district court judicially reviewed the MSPB final decision and de novo trial on the handicapping and sex discrimination claims.

April 7, 1992: Petitioner does not prevail before the Eighth Circuit

May 5, 1992: Petitioner's petition for rehearing is denied by the Eighth Circuit

JURISDICTIONAL STATEMENT

1. Date of entry of judgment to be reviewed: April 7, 1992

2. Date of rehearing: May 5, 1992

3. Jurisdictional grounds for the petition for writ of certiorari: final decision of a court of appeals, R.U.S.S.C. Rule 10

STATUTES AND REGULATIONS RELIED UPON IN THIS CASE [FULL TEXT IS IN THE APPENDIX]

5 U.S.C. Sec. 7703(c)

5 U.S.C. Sec. 7702(d)(1)

5 C.F.R. Ch. II (1-1-88 Ed.) Secs. 1201.3, 1201.111, 1201.113, 1201.114

29 C.F.R. Secs. 1613.701 et seq.

28 U.S.C. Sec 1291

5 U.S.C. Sec. 552a(a)(1-5)

5 U.S.C. Sec. 552a(e)(3)(A)-(D)

5 U.S.C. Sec. 552a(e)(9)

5 U.S.C. Sec. 552a(g)(1)(D) and (2)(B)

STATEMENT OF THE CASE

Petitioner was a career federal employee employed by Respondent Department of Health and Human Services from January 1976 through May 13, 1988. Petitioner had been, from 1976-1980, in a lab and from 1980 forward in an office setting writing scientific reports. Petitioner had sought medical help for prolonged breathing difficulty both after phosgene exposure in 1974 while employed at a Louisiana chemical plant and also in the time frame of 1976 through 1980 when solvents at DHH's labs caused the same breathing problems as occurred in the aftermath of the phosgene exposure. This information regarding the breathing problems was disclosed during Petitioner's DHHS fitness-for-duty examination in 1980 and 1981 forward and appeared on the DHHS's doctor's data sheets for those

years, data sheets which remained at all times in the exclusive control and possession of DHHS at the work site. The solvent-induced breathing problems were disclosed to two of Petitioner's supervisors at DHHS in the 1976-1980 time frame. At trial, one such supervisor could not recall such a conversation but this ex-supervisor was then a named defendant in a lawsuit for which Petitioner was an attorney for the plaintiff.

Petitioner had, in May 1987, challenged a position classification system being implemented at Petitioner's work site. The challenge was in the form of a query at a staf metting held by management to answer staffers quetions regarding the proposed--and later implemented--position classification system counter to the one in the federal code. When managemnt told

Petitioner to shut up and sit down in the midst of an otherwise un- eventful meeting, the room erupted in cheers, shouts and catcalls that management take that same advice. Meeting attendees were assured that the OPM had approved the new position classification system and within a month of Petitioner's written request for that written approval from OPM to DHHS regarding the new classification system, DHHS had had its contract medical advisor in Rockville, MD devise medical tests the DHHS demanded Petitioner produce to avoid an assignment to a lab.

This lab assignment was verbally proposed in June-July 1987 when Petitioner wrote to OPM--and OPM disclosed Petitioner's query to DHHS. DHHS formalized the lab assignment in February 1988 and stated that Petitioner could avoid the lab assignment

only if Petitioner could produce the results of medical tests Petitioner's physicians had never heard of.

Petitioner demurred as to the lab assignment while accumulating all medical records, the older ones proving impossible to obtain. Petitioner requested transfers or any other duties besides those involving work near solvents, all to no effect. Petitioner had sufficient non-lab duties in her office job to stay employed but those were the duties DHHS was going stop Petitioner from performing so that Petitioner could enter a lab. Petitioner was told that a transfer was available and to contact DHHS in Washington but when the contact with DHHS Washington management was made to get details, that management stated that the "transfer" was for Petitioner to seek employment elsewhere, outside of DHHS.

Petitioner had been asked to resume lab duties in 1985 but that assignment was dropped after Petitioner's physician told Petitioner that instead of breathing problems, one day a solvent could cause Petitioner to stop breathing completely. Petitioner relayed this information to her then-supervisor and produced a letter from her physician written as a result of the above visit, a letter that restricted Petitioner from any solvent exposure.

The February 1988 request for medical records specifically stated that Petitioner provide medical records that showed the specific chemicals and the concentrations of those chemicals that caused the adverse breathing problems experienced by Petitioner. Thousands of chemicals and concentrations of same would have to be "tested" to give the data sought by Respondents; Petitioner's medical doctors stated no such medical tests existed and therefore could not be performed to give the requested

information. DHHS did disclose the existence of one U. S. physician who might perform such tests with the initial disclosure being made in the midst of the MSPB hearing. The one U. S. physician practiced in Denver, Colorado whereas Petitioner lived and worked in the Little Rock, Arkansas area.

When Petitioner could not produce the results of the medical tests requested by DHHS but which Petitioner's doctors had never heard of, Petitioner was assigned in early May 1988 to the labs with the initial assignment to be 32 hours a week, AWOL unless Petitioner was in the labs and 8 hours in the office doing Petitioner's scientific writing assignments. This split of time was temporary until such time as sufficient AWOL was accumulated so as to be enough to fire Petitioner. Petitioner

inquired as to the quantity of AWOL that the DHHS would accumulate and such sum was never disclosed. The split assignment was formalized on May 13, 1988 after being verbally made approximately one week earlier.

Petitioner thus expected to be terminated at any time but at an undisclosed time with only 8 hours compensable work assured until the undisclosed AWOL total was reached. Petitioner was at all relevant times a full time (40 hours a week) career federal employee with perfect employee job performance ratings over the time of January 1976 through the last rating in the fall of 1987.

Petitioner reviewed the handwriting on the wall and sought other employment on May 15, 1988. Petitioner refused to formally

resign, contending constructive termination of employment. DHHS kept Petitioner on the payroll system until late July 1988 and accumulated those post-May 13, 1988 hours as AWOL on the payroll system. DHHS fired Petitioner in late August 1988 based upon the post-May 13, 1988 AWOL and the allegation that Petitioner did not contact the DHHS after May 13, 1988. Petitioner and her attorney did contact the DHHS in this post-May 13, 1988 time period with such letters appearing in the MSPB administrative record.

DHHS had logged 14 hours of AWOL against Petitioner in April 1988: 8 hours for a day in which Petitioner took credit leave with the credit leave being retroactively changed to AWOL on the basis of a memo Petitioner's supervisor issued after the credit leave was taken and 6 hours two days

later for sick leave after the DHHS was given the actual medical records for that 6 hours, medical records that clearly showed treatment for a knee condition.

DHHS also issued a reprimand to Petitioner in early May 1988 for refusing to accept the first lab assignment made in early April 1988. That assignment was rescinded by DHHS after Petitioner had a strongly worded call with DHHS's medical advisor in Rockville, MD, the first of two calls he accepted. The second call was in the same time frame and was brief as the medical advisor refused to talk to Petitioner. The reprimand was issued after this first directive to enter the lab was rescinded. DHHS did not use the pre-May 13, 1988 AWOL in its total accumulated to fire Petitioner.

DHHS did not use the pre-May 13, 1988 AWOL in its total accumulated to fire Petitioner. DHHS did not use the early May 1988 reprimand either as a basis for termination.

DHHS's medical advisor twice stated in writing in the March-April 1988 time frame that he would not restrict Petitioner from lab duties unless Petitioner produced the medical tests results Petitioner's doctors had never heard of. But, DHHS contended throughout the litigation (after the medical advisor admitted in the MSPB hearing that he thought one U. S. doctor did the tests he had requested of Petitioner in February 1988) that DHHS really didn't mean what its advisor said in writing in the February-May 1988 time frame about the only-one-U.S.-doctor-does-them tests and that any medical records

documenting the phosgene-induced breathing problem would have been accepted. Those other records were tendered by Petitioner and rejected by DHHS in the February through May 1988 time frame. The breathing problem was memoralized in DHHS's own medical records on Petitioner and those DHHS records were ignored by DHHS. DHHS's medical advisor never examined Petitioner and never saw her until the MSPB hearing. DHHS ignored Petitioner's treating physicians' recommendations that Petitioner not be exposed to solvents.

DHHS never articulated a pre-May 13, 1988 reason for termination.

In the fall of 1987, the staff at the unit (NCTR) of the agency which employed Petitioner requested that Petitioner submit a "package" of information to the NCTR Support/Service Scientist Peer Review (Peer Review) committee. Peer Review was the position classification system that sparked Petitioner's comments at the open meeting in May 1987. The package consisted of past work history, current accomplishments, current grade and position, current position description and like information. A group of non-personnel staffers at the employing unit ther evaluate the package and set the employee's grade. A non-personnel staffer was the requestor of the information.

Petitioner requested permission to be removed from the Peer Review grading

system because Petitioner had not been in a lab doing support scientist lab work since 1980. The agency refused the request and demanded the package which Petitioner submitted after verbal cautions about the effect of not complying with the request for the package. The package was requested via use of a short note to Petitioner on agency memorandum letterhead; the request and the content of a Peer Review package were Petitioner's exhibits before the district court. That note did not comply in any respect with 5 U.S.C. Sec. 552a(e)(3).

BASIS FOR JURISDICTION IN THE FEDERAL DISTRICT COURT

42 U.S.C. Sec. 2000e-16(c) by operation of 5 C.F.R. Sec. 1201.158, 5 U.S.C. Sec. 7703(b)(2), 5 U.S.C. Sec. 7702(a)

5 U.S.C. Sec. 552a(g)(1)(D)

BASIS FOR CERTIORARI

1. There is conflict among the circuits as to whether the judicial review from MSBP decisions should involve application of the standards set forth in 5 U.S.C. Sec. 7703(c) to the employing agency's actions or application to the MSPB final decision. R.S.C.U.S. Rule 10(a).

2. The Eighth Circuit Court of Appeals has applied 5 U.S.C. Sec. 7703(c) to final decisions of the Merit Systems Protection Board instead of to the employing agency's actions in contravention of Department of Navy v. Egan, 108 S. Ct. 818 (1988). R.S.C.U.S. Rule 10(c).

3. The Eighth Circuit Court of Appeals has decided a federal question--the weight to give to credibility

based facts and facts determined on other bases determined by an MSPB administrative law judge acting under color of federal law--

contrary to this Court's decision in Universal Camera Corp. v. National Labor Relations Board, 71 S. Ct. 456 (1951).

4. The Eighth Circuit Court of Appeals decided an issue--the reasonableness of an employee's decline of a job assignment based upon health concerns--contrary to the United States Supreme Court's decision in Whirlpool Corp. v. Marshall, 100 S. Ct. 883 (1980). R.S.C.U.S. Rule 10(c).

5. The Eighth Circuit Court of Appeals has decided that it may affirm a lower court's decision in which the lower court chose among several disjunctively listed criteria set out in 29 C.F.R. Sec. 1613.701 et seq.

with the effect of such choice that the lower court chose the criteria that Petitioner could not satisfy and ignored those criteria Petitioner could satisfy and thus denied relief to Petitioner. This is an important question of federal law which has not been but should be decided by this Court, both in the general interpretation of statutes and regulations and in the specific context of the regulations proscribing discrimination against handicapped federal employees. R.S.C.U.S. Rule 10(c).

6. It is a departure from the usual course of judicial proceedings for the Court of Appeals to not address nor even mention three issues on appeal to that appellate court. R.S.C.U.S. Rule 10(a).

DISCUSSION

The bases numbered 1 through 3 relate to Issues 1 and 2, basis numbers 4 and 5 relate to issue 3.

BASIS 1

Petitioner has contended throughout the litigation that the standard for judicial review of a final decision of the Merit Systems Protection Board (MSPB) should involve the reviewing court's examination of the EMPLOYING AGENCY'S ACTIONS when applying 5 U.S.C. Sec 7703(c). The district court, when conducting its judicial review of the civil service portion of Petitioner's mixed case, applied the standards in 5 U.S.C. Sec. 7703(c) to the final decision of the MSPB and not to

the employing agency's "action, findings, or conclusions" and the Eighth Circuit upheld this interpretation of 5 U.S.C. Sec. 7703(c). Petitioner's contention that Sec. 7703(c) applies to the actions of the employing agency stems from several sources.

First, 5 U.S.C. Sec. 7703(c) uses the word "agency" in the first sentence. "In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--. . . ." In 5 U.S.C. Sec. 7703(a)(2) a clear distinction is made between the MSPB and the employing agency. Further, the judicial review is of the record created by the MSPB and if the review was to be of the Board's action, finding, or conclusions then Congress would have said so. Instead,

Congress used the word "agency" in the first sentence of 5 U.S.C. Sec. 7703(c).

The MSPB hears a limited, by regulation, set of appeals. 5 C.F.R. CH. II (1-1-88 Ed.) Sec. 1201.3. Those appeals are from actions taken against a federal employee by an employing agency of the United States government. Id.

As noted above, the MSPB creates the administrative record or "record" described in 5 U.S.C. Sec. 7703(c). To do so in the instant case, the MSPB assigned an administrative law judge (ALJ) to the case and held an evidentiary hearing. That ALJ made findings of fact based upon credibility determinations and also based upon the exhibits and other testimony. The record so created consists of not only the MSPB's evidentiary record of exhibits and testimony but also the initial decision of the ALJ in this case and the final decision

of the full Board. Petitioner contends that the judicial review should apply the standards of Sec. 7703(c) to the employing agency's actions as developed and memorialized in this record.

In the instant case, the reviewing district court took a part of the record, the final Board decision, and applied the Sec. 7703(c) criteria to that small part of the record, ignoring the rest of the record which included the ALJ's credibility based findings and evidentiary exhibits. "Record" is apparently defined in 5 U.S.C. Sec. 7702(d)(1). Most worrisome was that the full Board's decision--the only portion of the record considered by the district court--overturned the ALJ and cited as reasons for so doing "evidence" not even in the record nor susceptible of inference from the record. Petitioner contends that had the district court conducted its

judicial review on the entire record as required by Sec. 7703(c), Petitioner would have prevailed.

The federal circuit has applied the 5 U.S.C. Sec. 7703(c) criteria to only the MSPB's final decision. "When reviewing a decision of the MSPB, this court will affirm that decision unless it is found to be: 1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; 2) obtained without procedures required by law, rule or regulation having been followed; or 3) unsupported by substantial evidence." Gromo v. Office of Personnel Management, 944 F.2d 882 (Fed. Cir. 1991). "We must affirm the Board's decision unless it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, obtained without procedures requires by rule, law or regulation or unsupported by

substanital evidence." Addison v. Department of Health and Human Services, 945 F.2d 1184 (Fed. Cir. 1991). In accord with both Gromo and Addison are the Federal Circuit's holdings in Mendoza v. Merit Systems Protection Board, 949 F.2d 391, 393 (Fed. Cir. 1991), Webster v. Department of Army, 911 F.2d 679 (Fed. Cir. 1990) and Connolly v. United States Department of Justice, 766 F.2d 507, 511 (Fed. Cir. 1985), "[i]t is the final decision of the board we are now called upon to review."

The court in Connolly did recognize that the presiding official's decision is only a part of the record. Id. at 510. In contrast, the Federal Circuit reviewed an arbitra- tion decision under MSPB standards and concluded that the decision to remove the employee (agency's action) was properly reviewed using Sec. 7703(c). Hunt v. D.H.H.S., 758 F.2d 608 (Fed. Cir. 1985).

Other Federal Circuit decisions have applied Sec. 7703(c) to the employing agency's actions. The predecessor of the Federal Circuit, the D. C. Circuit, applied Sec. 7703 to the employing agency's actions. Hayes v. United States Government Printing Office, 684 F.2d 137 (D.C. 1982). Hayes dealt with whether a mixed case should be bifurcated but the court did state that "[i]f an employee does not allege that 'a basis' of the agency action was discrimination, he may appeal directly from the MSPB to the court of appeals or Court of Claims." Id. at 139. Further, a 1981 case also out of the D.C. Circuit also applied the Sec. 7703(c) standard to the actions of the employing agency. "We discharge our own duty when we apply section 7703 to review an MSPB decision regarding an adverse agency action to determine whether the contested decision

complies with the applicable statute and regulations and whether it has a rational basis support by substantial evidence from the record taken as a whole." Hayes v. Department of the Navy, 727 F.2d 1535 (D.C. Cir. 1984).

The First Circuit interpreted 5 U.S.C. Sec. 7703(c) as does Petitioner, i.e. "[a] court shall set aside the agency decision if it is found to be arbitrary or capricious, an abuse of discretion, obtained without procedures required by law, or unsupported by substantial evidence. 5 U.S.C. Sec. 7703(c)." Diaz v. United States Postal Service, 853 F.2d. 5, 8 (1st Cir. 1988).

The Second Circuit also interprets 5 U.S.C. Sec. 7703(c) as does Petitioner. "Confronted with the task of reviewing agency action dismissing an employee as a result of off-duty misconduct, courts face

a difficult dilemma." Borsari, v. Federal Aviation Administration, 699 F.2d 106, 109 (2nd Cir. 1983).

Weston v. United States Department of Housing & Urban Development, 724 F.2d 943 (3rd Cir. 1983) applied the interpretation of Sec. 7703 urged by Petitioner. The Weston court noted "[T]he decision of the MSPB is to be affirmed unless the action of HUD [employing agency] in terminating Ms. Weston has been shown to have been arbitrary, capricious, an abuse of discretion, not in accordance with law, not obtained in accord with procedures required by law, rule or regulation, or unsupported by substantial evidence." Id. at 948.

The Fourth Circuit appears to review the decision of the agency in deciding whether an employee was properly removed from service. Starrett v. Special Counsel, 792 F.2d 1246 (4th Cir.d9 1986). The

judicial review of the MSPB decision involved a detailed examination of the agency's actions as developed by the MSPB fact-finding process. Id.

The Fifth Circuit appears to judcially review the MSPB "action, findings, or conclusions" instead of those of the employing agency. Lyles v. United States Postal Service, 709 F.2d 359, 360 (5th Cir. 1983).

The Seventh Circuit also appears to apply the standards of 5 U.S.C. Sec. 7703 to the MSPB decision instead of the agency's actions. Ryan v. united States Department of Justice, 950 F.2d 458 (7th Cir. 1991).

The Eighth Circuit appears to adhere to the cases in the Seventh and Tenth Circuits. Grasso v. Internal Revenue Service, 657 F.2d 224 (8th Cir. 1981).

In Morales v. Merit System Protection

Board, 932 F.2d 800 (9th Cir. 1991) the Ninth Circuit determined that the district court could not make determinations relating to credibility in a discharge case. The Morales district court looked at the administrative record created by the Board and determined that charges the agency made against the employee had merit but that it was error for the district court to make its own credibility determinations from the record. It appears, from Morales, that the Ninth Circuit is following the position urged by Petitioner.

The Tenth Circuit noted that "[t]he review by the MSPB of a Chapter 75 action is denominated 'an appeal' of agency action." Jackson v. Veterans Administration, 768 F.2d 1325, 1329 (10th Cir. 1985). At footnote 4, the Jackson Court noted the following.

> The statute in 5 U.S.C. Sec. 703(c) refers ambiguously to this court's review of 'agency action' to determine if it is supported by 'substantial evidence.' In view of the de novo nature of the proceeding before the MSPB, this court has concluded that it must review the agency action based on the record made to the MSPB and the MSPB findings, rather than review the agency action solely on the basis of the agency's record. [Citations omitted.]

The Eleventh Circuit definitely, clearly and emphatically distinguished between the agency and the MSPB in Doyal v. Marsh, 777 F.2d 1526 (11th Cir. 1985). To make the distinction, Doyal noted H.R. Conf. Rep. No. 95-1717 which listed eight situations in which a federal employee had a right to file suit. Id. at n. 7. Doyal involved the issue of whether a mixed case proceeds as a unit through the appeals process.

A Louisiana court applied the 5 U.S.C. Sec. 7703 standards to the MSPB

decision, going so far as to supplant the word "agency" in Sec. 7703(c) with "Board." Tilley v. Frank, 728 F. Supp. 1293, 1296 (M.D. La. 1990).

SUMMATION

The Federal Circuit has applied Sec. 7703(c) to both MSPB final decisions and to actions of the employing agency. The First, Second, Third, Fourth, Ninth, Tenth, Eleventh and Twelfth Circuits seem, from the cases, to follow the position urged by Petitioner. The Fifth and Seventh follow the position of Respondents as does the Eighth Circuit or this petition would not have been filed.

SECOND BASIS FOR CERTIORARI

In Department of Navy v. Egan, 108 S.

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Ct. 818 (1988) this Court held that federal employees covered by the MSPB regulations "may appeal the agency's decision to the Board . . . which is to sustain the action if it is 'supported by a preponderance of the evidence.'" Id. at 821.

The district court and the Eighth Circuit Court of Appeals applied the standards of 5 U.S.C. Sec. 7703(c) to the final decision of the full MSPB board and not to the actions of the employing agency as required by Department of Navy v. Egan, 108 S. Ct. 818 (1988).

THIRD BASIS FOR CERTIORARI

The MSPB's ALJ made credibility based findings of fact and those findings were ignored by the full Board which set aside the ALJ's initial decision in favor of

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Petitioner. Specifically, Petitioner prevailed on three claims because of the evidentiary record and because of the credibility based findings of fact made by the ALJ. The full Board, on review requested by Respondents, simply ignored the ALJ's credibility based findings of fact and then supplied findings of its own, findings that in several instances were not in the evidentiary record in the form of testimony or exhibits. As such, the Board's actions were at variance with the MSPB regulations and were also at variance with the holdings of this Court in Universal Camera.

This Court in Universal Camera Corp. v. National Labor Relations Board, 71 S. Ct. 456 (1951) held that credibility based findings of fact should not be disturbed on judicial review unless it would be clear error to allow those findings to

stand.

> Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.

Universal Camera Corp. v. National Labor Relations Board, 71, S. Ct. 456, 468 (1951). Neither the district court nor the court of appeals in the instant case referenced Universal Camera. Universal Camera applies to MSPB decisions because the MSPB is an ajudicatory agency just as is the National Labor Relations Board.

The MSPB ALJ's decision is an "initial decision" which becomes final upon passage of time. 5 C.F.R.Ch. II(1-1-88 Ed.) Secs. 1201.111 and

1201.113. There is no additional fact finding made by the Board beyond that of its ALJ.

As such, the regulation promulgated by the MSPB and cited above does not substantively deviate from the maxim set forth in Universal Camera. If the MSPB ALJ's credibility based findings or any other findings could summarily be ignored by the full Board or on judicial review then presumably Congress would have said so.

If the full Board or the district court or the court of appeals had applied Universal Camera as required then Petitioner would have prevailed because the Respondents did not show that the ALJ's findings, credibility based or otherwise, were clearly erroneous.

BASIS FOR CERTIORARI NUMBER FOUR

This Court, in Whirlpool Corp. v. Marshall, 100 S. Ct. 883 (1980) held that an employee may refuse to perform an assigned task if the employee's fears for his health and safety are reasonable.

The Eighth Circuit held that the appropriate standard was "justifiable" and not reasonable. "Justifiable" was not quantitated but ordinary word usage indicates that "justifiable" places a burden on the employee to convince the employer of the genuineness of the employee's fears whereas "reasonable" is a lesser standard for an employee to satisfy.

Had the Eighth Circuit applied the "reasonableness" test to the facts of Petitioner's case, Petitioner should have prevailed.

BASIS FOR CERTIORARI NUMBER FIVE

Petitioner prevailed before the MSPB's ALJ on the issue of handicapping discrimination, a determination set aside by the full Board. After trial de novo on this issue, Petitioner lost before the district court and the court of appeals when the latter two chose among criteria set apart by the word "or" and chose the criteria so set apart in such a way as to chose the criteria least fitted to Petitioner's claims where, had the district court and court of appeals chosen other of the disjunctively listed criteria, Petitioner would have prevailed.

Petitioner states that if a series of criteria are set apart by the word "or" and if Petitioner fits one of the criteria so listed then that should allow recovery for Petitioner. To restate, the trial

court and court of appeals, on review, should not select the least appropriate of several criteria listed and separated by "or" as the sole basis for recovery.

Federal employees are protected against discrimination based upon the employee's handicapping condition. Recovery is allowed if the employee fits a series of specifically defined terms. 29 C.F.R. 1613.701 et seq.

The ALJ chose the criteria listed in 29 C.F.R. Sec. 1613.701 et seq., separated by "or" that fit the facts of the case, and held Petitioner was a handicapped individual.

The district court chose the poorest "fit" of the criteria separated by "or" and denied Petitioner recovery on the handicapping claim.

This area of statutory interpretation

should be clarified, particularly in the context of 29 C.F.R. Sec. 1613.701 et seq.

SIXTH BASIS FOR CERTIORARI

A timely appeal from a district court to a court of appeals is a right available to litigants. 28 U.S.C. Sec. 1291. It follows that if the issue is properly appealed as the Privacy Act claim dealing with the deficiency of the form requesting information was, then the litigant is entitled to have the Court of Appeals review the district court's opinion on the issue. The Court of Appeals failed to even mention, much less address, the issue of the sufficiency of the request for information made under the Privacy Act.

Petitioner raised two Privacy Act

claims in her complaint. One dealt with release of information; the other attacked the request for information on the theory that proper procedures were not followed in obtaining the information adn that persons not entitled to the information were the ones requesting the information.

At trial, Petitioner introduced, without objection on the part of the Agency, evidence that established that the document used to request the information did not conform to the Privacy Act. The Act details explicit requirements for a form used to requet information covered by the Privacy Act.

The inadequacies of the form used to request Privacy Act information were briefed in the district court post-trial

brief. That same "inadequacy-of-form" issue was before the Court of Appeals which did not mention any Privacy Act claims/issues in its opinion.

Petitioner contends that the mandatory language of 28 U.S.C. Sec. 1291 confers jurisdiction on the Court of Appeals of "all final decisions of the district courts of the United States . . . " and a fair reading of Sec. 1291 is that the entirety of the final decision is before the Court of Appeals and the Court of Appeals must address all issues within that final decision. The address may be perfunctory or brief but the issues must be addressed. This the Court of Appeals failed to do, thus depriving Petitioner of that tier of review, a tier granted under 28 U.S.C. Sec. 1291.

Supreme Court, U.S.
FILED
AUG 3 1992
OFFICE OF THE CLERK

92-762

No. _____

UNITED STATES SUPREME COURT

October 1992 TERM

DIANA M. MAULDING Petitioner

v.

LOUIS W. SULLIVAN, Secretary of Department of Health and Human Services; DEPARTMENT OF HEALTH AND HUMAN SERVICES Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

APPENDIX PETITION FOR WRIT OF CERTIORARI
VOL. 1 OF 2

Diana M. Maulding
Petitioner
1406 Ivy Chapel Road
Little Rock, AR 72206

501-888-7180

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United States Court of Appeals
For The Eighth Circuit

No. 91-2747

Diana M. Maulding	Plaintiff/ Appellant
v.	
Louis Sullivan, Secretary [sic]	Defendant/ Appellee

Submitted: January 10, 1992

Filed: April 7, 1992

Before Arnold, Chief Judge, McMillian, Circuit Judge, and Wellford, Senior Judge (The Honorable Harry W. Wellford, Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.)

Wellford, Senior Circuit Judge.

Plaintiff, Diana Maulding, filed a complaint with the Merit Systems Protection Baord (MSPB) alleging that she was constructively discharged from her agency job at the National Center for Toxicological REsearch (NCTR), Food and Drug Administration (FDA), United States

Public Health Service, based on adverse agency actions as well as charging sex and handicap discrimination. 1 The administrative law judge (ALJ) found in her favor on the handicap discrimination claim, but found for the defendant on all other claims. The agency appealed the ALJ's decision to the MSPB which reversed the rulings on handicap discrimination that were favorable to the plaintff. The district court, on appeal, affirmed and dismissed all of plaintiff's claims for relief. We AFFIRM.

The plaintiff began her employment with the Public Health Service, a divison of the Department of Health and Human Services, in 1976. From 1976 to late 1980, she worked as a chemist in a laboratory, first in the Teratology Division and then in the Chemistry

Division. She made no complaints to her superior about breathing or pulmonary problems during the time. In December, 1980, the plaintiff was reassigned to a position as a pharmacologist in the Office of Scientific Intelligence, which later became part of the Division of Comparative Toxology [sic], working in an office rather than in the laboratory.

When Dr. Lionell [sic] Poirier became Director of the Divison of Comparative Toxology [sic] in early 1987, he began undergoing a long planned reorientation from "paper" research to bench or laboratory research in the area of nutritional toxology [sic], the area in which plaintff worked. Dr. Poirier spoke with each member of his staff regarding the proposed transition to laboratory research. At that time, Maulding informed

him that she would not work in the laboratory due to a claimed allergy to certain chemicals which would be utilized in the laboratory.

In early 1988, persisting in her claims that she could not safely work in the laboratory, Maulding requested part-time work at NCTR so that she could obtain an outside position as a part-time law clerk to support herself. She reiterated her claim that health considerations precluded her from participating in lab work. In February of 1988, Dr. Poirier denied her request for part-time work. Insisting that the Division would be doing primarily lab
work, Dr. Poirier asked the plaintiff to produce specific and current information about her alleged allergies or sensitivities to various substances to

support her request to be excused from lab work. Dr. Poirier informed the plaintiff that her request would be submitted [to] and reviewed by Dr. George Smith, the agency's medical advisor, pursuant to OPM regulations.

In response to Dr. Poirier's request, the plaintiff submitted a letter from Dr. Alvin Strauss, dated April 18, 1985, recommending that she not be assigned to the lab. 2 Dr. Strauss' letter indicated that the plaintiff's "further exposure to noxious fumes" is detrimental to her heath based on adverse asthmatic reactions from Maulding's claimed exposure to phosgene some ten years earlier. Along with Dr. Strauss' letter, the plaintiff submitted copy of Dr. Poirier's request for medical documentation and a memorandum dated March 11, 1988, prepared by Dr. Poirier and

addressed to Dr. Smith, which listed the chemical compounds that might be present in the lab. A proposed position description was also presented which indicated that the plaintiff would be conducting in vitro cell culture experiments in the lab.

Dr. Smith reviewed the documents submitted by the plaintiff to ensure that (a) the diagnosis or clinical impression was justified in accordance with established diagnostic criteria; and (b) the conclusion and recommendation were not inconsistent with generally accepted medical principles and practices according to 5 CFR Sec. 339.102, the applicable regulation. On March 25, 1988, Dr. Smith wrote a memorandum to Mary Long, an employee relations specialist, FDA, stating that "without clinical records to

document the existence of a medical condition that warrants restriction from specific chemical exposure, and documentation that such exposures are likely to occur. . .," and "because no information exists that the plaintiff would be exposed to allergens in the laboratory to which she would not be exposed elsewhere, there is no medical basis upon which to recommend approval of her request."

On April 8, 1988, Dr. Poirier assigned the plaintiff to work in the laboratory. Because she did not come to work as ordered, Dr. Poirier next directed the plaintiff to report to the assigned laboratory job on April 13. On that day, she reported to NCTR for about two hours, without going to the laboratory. Dr. Poirier then charged the plaintiff with

absence without leave for two days because she did not report to the laboratory without any approved excuse for her absence. 3

Upon request, the plaintiff was granted more time to supply Dr. SMith with additional medical documentation supporting her health claims. Maulding then submitted the following additional documents: (1) copies of office records from March and April of 1988 from and Arkansas family [sic] clinic [sic]; (2) a letter, dated April 13, 1988, from Dr. Forrest B. Miller recommending that plaintiff refrain from lab work; (3) a copy of a medical record from Dr. Strauss' clinic; (4) a note to Dr. Smith from plaintiff dated April 22, 1988; (5) a copy of a page from the Dictionary of Chemical Producers showing that plaintiff's former

employer (prior to 1976) utilized phosgene; and (6) a memorandum from St. Vincent's Infirmary dated April 15, 1988. After reviewing this additional information, Dr. Smith determined that the records did not sufficiently indicate that the plaintiff had a disease of the lungs or respiratory system except for allergies that the plaintiff has had all her life. In summary, Dr. Smith concluded that Maulding failed to carry her burden of persuasion in this regard.

Dr. Poirier accordingly directed the plaintiff to report to the laboratory on May 11, 1988, and the plaintiff again refused to report for this work. Beginning May 16, 1988, the plaintiff neither reported for duty nor requested leave. On June 21, 1988, Dr. Poirier wrote to Maulding directing her to notify him by

June 28, 1988, of her intentions with respect to her assigned job. On July 15, 1988, in the absence of any response, Dr. Poirier notified the plaintiff that he proposed to remove her from federal service as a pharmacologist. Defendant asserts that Maulding was notified of her right to respond, but failed to do so. We are furnished no contrary information in this respect.

The deputy director of NCTR notified the plaintiff of her removal, effective August 27, 1988, for failure to follow a written direction and because of her absence without leave. There was no response.

On September 20, 1988, however, Maulding appealed her removal to the MSPB, alleging that the agency constructively and impermissibly discharged her. First, she

alleged that she was fired in reprisal for her "whistleblowing" activities in contesting NCTR's peer review system. 4 She also alleged that she was terminated as a result of sex discrimination and handicap discrimination. After a hearing, the ALJ reversed the agency's decision to discharge the plaintiff, determining that the agency's insistence on clinical medical evidence to support her request to be relieved of lab work was unjustified and that plaintifff's resonable fear for her health justified her absence from work. The ALJ also determined that the plaintiff was physically handicapped under the handicapped laws and that she had articulated a reasonable method of accommodating her handicap through reassignment. The AlJ rejected Maulding's allegation of reprisal because of her opposition to the peer review system, and

because she did not show that retaliation was the motivating factor for her reassignment to lab work. The AlJ also rejected the appellant's claim of sex discrimination as unsupported.

On the Agency's appeal to the MSPB, the Board reversed the ALJ finding for the agency, and against Maulding, in all respects. 5 It determined that the plaintiff's absence from duty was not justified and that the plaintiff had not met her burden under 5 CFR Sec. 339.101 to provide adequate medical documen tation that would excuse her from her assigned lab duties. The Board further found that the appellant was not
a handicapped individual under The Rehabilitation Act. 29 U.S.C. Sec. 701 et seq. The plaintiff appealed the Board's decision to the district court. Aftera

two-day trial, the district court affirmed the Board's decision. This appeal ensued.

The Board's decision on the discrimination claims before it were subject to de novo review by the district judge. The district court's findings as to claims of employment discrimination, however, are reviewed under a clearly erroneous standard. See Pullman-Standard v. Swint, 456 U.S. 273 (1982); Marafino v. St. Louis County Circuit Court, 707 F.2d 1005, 1006 (8th Cir. 1983); see also Anderson v. Bessemer City, 470 U.S. 564 (1985).

Plaintiff supplied insufficient evidence of sex discrimination under Title VII and we find no clear error in the district court's conclusion in this regard. 6 To support her claim, the plaintiff alleged that other males in her division were

liberally allowed relief from lab duties and that she was held to a more stringent standard. To support this allegation, the plaintiff showed that Greenman, a male employee, requested relief from lab work and that such relief was granted. Defendant's proof indicated, however, that Greenman based his request on a lack of ability to handle the job, not on a medical condition, and the two employees were, therefore, not similarly situated. Maulding also attempted to show that another male employee was absent without excuse and that he was not charged with AWOL as was she. That employee, however, was shown to have taken a normally scheduled day of credit leave and his absence was approved.

Maulding also fials in her claim of handicap discrimination. In order to state

a prima facie case of handicap discrimination under the Act, the plaintiff must show that she: (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 29 U.S.C. Sec. 706(8)(B)(i) to (iii) (1988) (emphasis added). See Jasany v. United States Postal Service, 755 F.2d 1244, 1248 (6th Cir. 1985). "Major life activities" includes "breathing," and "has a record fo such impairment" means that one has a history of has been classified as having a phyusical impairment that substantially limits a major life activity. Sec. 1619.701(c)(d).

The district court found on the record that the plaintiff had "failed to

establish a sensitivity to chemicals and a history of a substantial limitation upon employability as defined in [the regulations and cases]", accepting the testimony and opinion of Dr. Smith. Dr. Smith had concluded that plaintiff had produced inadequate, recent medical history concerning her alleged condition; that her doctors' medical opinions lacked supportive clinical findings; and that there was insufficient indication of a severe respiratory problem that would be aggravated by the assigned lab work. The district court based its conclusion primarily on the premise that the plaintiff has the burden to show she is a handicapped person under the Rehabilitation Act and that because of her lack of evidence, she has fialed in that burden. See Jasany, 755 F.2d at 1248 (plaintiff's burden to show handicap). The

court further pointed out that cases in which handicaps were established, the plaintiffs all supported their allegations with adequate medical documentation. See Norcrossv. Snead, 755 F.2d 113 (8th Cir. 1985) (evidence shown to establish blindness); Harrison v. Marsh, 691 F. Supp. 1223 (W.D. Mo. 1988) (evidence produced to demonstrate muscle damage); Dept, of the Army v. Rhone, 665 F. Supp. 734 (E.D. Mo. 1987) (evidence produced to show history of sarcoidoisis (pulmonary disease)).

The district court held that even if the plaintiff were a handicapped person under the statute, she could not show that her sensitivity to chemicals substantially limits her major life activities. We find no error in its conclusion that her ailment would prevent her only from lab

work, and that such a limitation does not substantially limit her employment as a whole. See Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986) ("an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job."); Jasany, 755 F.2d at 1248-1249 (major life activity not substantially limited when impairment interferes with performance of one particular job). We agree with the reasoning of the district court and find that it was not error to reject the plaintiff's claim of handicap discrimination on the basis of failure to carry the burden or proof in this regard.

In regard to the standard of review for the nondiscriminatory adverse agency actions, the same standard is employed at

both the trial and the appellate levels. We accord the district court's decison "no particular deference." First National Bank of Fayetteville, v. Smith, 508 F.2d 1371, 1374 (8th Cir. 1974), cert. den. 421 U.S. 930 (1975); see also Lockhart v. Knops, 927 F.2d 1028, 1032 (8th Cir. [date missing]), cert. den., 112 S. Ct. 186 (1991); Brown v. United States dept. of Interior, 679 F.2d 747, 749 (8th Cir. 1982). "The scope of judcial review of decisions by the [MSPB] is limited to ensuring that required procedures have been followed and that the action taken was not arbitrary or capricious." Grasso v. IRS, 657 F.2d 224, 225 (8th Cir. 1981). To be sustained, the agency decision need only have had a rational basis in law. Id.; see also Hurley v. United States, 575 F.2d 792, 793 (10th Cir. 1978); 5 U.S.C. Sec. 7703(c) (1988). 7

With respect to Maulding's nondiscrimination claims (whistle-blowing, harassment and procedurel deficiencies) we find that the Board's decision was not arbitrary nor capricious. We agree with the district court that "the decision of the Board was supported by substantial evidence. It is clear that the Board's decision was neither arbitrary nor capricious nor an abuse of discretion." 8

Although given sufficient opportunity, Maulding provided inadequate medical evidence to justify being excused from lab duty. Dr. Smith reviewed the medical documentation according to 5 C.F.R. Sec. 339.101 which requires that "the diagnosis or clinical impression is justified in accordance with established diagnostic criteria." Maulding failed to demonstrate

that his conclusions and recommendations were "inconsistent with generally accepted medical principles and practice." After concluding that her initial submission of medical information was inadequate, Dr. Smith gave the plaintiff extra time to supplement her documentation.

The record and briefs show and the district court found that, in total, the plaintiff submitted statements of two doctors that she refrain from lab work, based on some work documentatiion, some clinical evidence, and a memorandum of her reported history of chemical expousre. Her clinical work showed that her x-rays were normal, and her pulmonary function studies did not require restrictions to her chemical exposure. 9 Her doctors' letters contained statements that the plaintiff should refrain from working in the lab,

based primarily on her own information, fears, and subjective concerns. Neither was supported by sufficient records, treatment plans, or other corroborating evidence.

Dr. Smith concluded that the letters and other documentation were inadequate as a medical basis upon which he could conclude that there was a serious health risk involved in the assigned lab work. He had given the plaintiff a list of chemicals to which she would be exposed in the lab, and no doctor made specific findings that those certain chemicals would harm the plaintiff.

WE find no error in the Board's conclusion, and the district court's conclusion, that plaintiff showed no serious risk of harm that would result

from exposure to the chimcial agents utilized in the laboratory. We note that at a time closer to her alleged exposure to phosgene over a period of years through 1980, plaintiff had worked without complaint. Maulding now harbors genuine fears and concerns about respiratory problems, and that she was presented with some difficulties by reason of passage of time in obtaining medical proof. It is regrettable that the agency, for whatever reasons, could find no basis to accommodate the wishes and concerns of this experienced employee. She has demonstrated energy, intelligence, and persistence in pursing her claims before the administrative agencies and the court, unfortunately to no avail. We are sympathetic to her contention that her doctors did not know how to test her chemical aversions and that defendant was

obdurate in insisting upon data available only from limited sources. These acknowledged concerns on our part do not overcome plaintiff's failure on this record to carry her burden of demonstrating handicap, disability, or justified health concerns that would preclude at lease an effort to report for, and to attempt to perform, her assigned work.

Although the issues were close, for the reasons indicated, we affirm the decision of the district court.

A true copy. Attest: Clerk, U.S. Court of Appeals, Eighth Circuit.

footnotes

1 Maulding is now a lawyer and is proceeding pro se.

2 Dr. Struass was deceased at the time Dr. Poirier requested medical documentation. The three-year-old letter from Dr. Strauss was not accompanied by any documentary explanation for his recommendation.

3 On April 11, 1988, the plaintiff telephoned Dr. Smith and asked him to "rescind" his memorandum rejecting her requsts until she could present more medical documentation. Dr. Smith informed the plaintiff that he could not rescind his memorandum and suggested to her that she request relief from her supervisor. The plaintiff wrote to Dr. Poirier on April 13, 1988, requesting time to submit additional medical documentation to Dr. Smith. This request was granted.

4 In May 1987 the NCTR issued a guide or peer evaluation plan called "The Evaluation Plan for Support/Service Scientist Postions at NCTR." The guide provided for panels to review information regarding qualifications and classifications of non-research scientists. The plaintiff stated her opposition to the guide at an NCTR meeting in May, 1987. On July 10, 1987, the plaintiff wrote to the deputy regional director for the Office of Personnel Management (OPM) objecting to the guide as being illegal. On July 29, 1987, the OPM responded that the guide was consistent with the Classification Act and that the OPM would not intervene in the review of support scientist positions at NCTR.

5 Maulding filed no cross appeal or protective appeal to MSPB from denial of

her retaliation and sex discrimination claims.

6 We note also that plaintiff did not effect a timely appeal from the adverse determination by the AlJ of her sex discrimination claim. The same procedural deficiency applies to her "whistle-blowing" or retaliation claim which the AlJ found to be unsubstantiated.

7 5 U.S.C. Sec. 7703(c) (1988) provides:

[T]he court shall review the record and hold unlwful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence.

8 The plaintiff did not petition for review of the ALJ's findings with respect to her claim of reprisal with the MSPB. See MSPB Order at p.3 n.2. The plaintiff, furthermore, submitted no tenable evidence to support this allegation.

9 The plaintiff claims that Phosgene, a chemical to which she was exposed on the early 1970's, does not show up on a pulmonary examination. There is no evidence, however, that phosgene is one of the chemicals to be used in the lab.

IN THE UNITED STAES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

DIANA M. MAULDING PLAINTIFF

v. No. LR-C-90-42

Louis W. Sullivan, Secretary,
Department of Health & Human
Services, et al DEFENDANTS

Memorandum Opinion

Plaintiff was removed from her position as GS-405-11 pharmacologist in the Division of Comparative Toxicology at the National Center for Toxicological Research (NCTR or Agency) Food and Drug Administration, Public Health Service, Department of Health and Human Service, in August, 1987. The Agency contends that she was absent without leave from May 16, 1988 to July 15, 1988, and that she failed to follow her supervisor's written instruction to return to work or to inform him of her intentions regarding her position with the Agency. Plaintiff appealed her removal to

the Merit Systems Protection Board (MSPB or Board), claiming that she had been justified in being AWOL because she feared reporting to the laboratory, as directed, would endanger her health. She also contended the Agency's determination that she had failed to present adequate medical evidence to support her request to be reliefed of her laboratory duties and claimed that the Agency's removal action was taken in reprisal for her "whistle-blowing" activities. The Board ultimately sustained the Agency's removal action.

Plaintiff is now before this Court appealing the Board's affirmance of her removal. In addition she is claiming that she was discriminated against because of her sex and an alleged handicapping condition. Moreover, she claims that the defendants have violated her rights under

the Privacy Act by revealing her leave status to a caller in the summoer of 1988 without permission. She also claims that the defendants violated the Privacy Act by demanding protected information from her in the context of the peer review policy adopted by the Agency.

Plaintiff's non-discriminatory claim

We will first deal with the non-discriminatory claim of the plaintiff--that plaintiff's conduct did not justify her removal from federal service and that the true reason for her removal was her "whiltleblowing" concerning the "peer review" program instituted at the agency. These claims were the subject of a hearing before and administrative law judge (ALJ). The latter decided in plaintiff's favor, but on appeal to the Merit Systems

Protective [sic] Board the ALJ was reversed and plaintiff's removal from federal service was upheld. My review of the Board's decison is extremely limited. It is restricted to a determination of whether the decision of the Board is supported by substantial evidence and whether it is arbitrary, capricious and an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. Sec. 7703(c).

Both parties concede that this is the standard of review for the non-discriminatory claims. Although the Board found that the handicap and sex discrimination claims were without merit, the parties agree that my review of these claims is de novo. Hayes v. united States Government Printing Office, 684 F.2d 137, 139-140 (D.C. Cir. 1982). See also Romin

v. Shear, 799 F.2d 146 (9th Cir. 1986), cert. denied, 481 U.S. 1050 (1987); Rana v. United States, 812 F.2d 887(4th Cir. 1987); Barnes v. Small, 840 F.2d 972 (D.C. Cir. 1988).

Plaintiff was absent without approved leave from May 15 to July 15, 1988, and disregarded orders to return to work. The crux of the plaintiff's dispute with the Agency is that her alleged sensitivity to chemicals warranted her AWOL status. The MSPB determined that the plaintiff had failed to support this allegation by proving that she was medically restricted from lab work. The Board found that her medical documentation was inadequate because it was based principally on her own subjective statements and medical reports from two doctors who based their reports on the same subjective statements

rather than on objective findings. The Board relied on 5 CFR Part 339 as furnishing a standard for medical documentation in the context. Part 339 appears in the record as Defendant's Exhibit 38.

Neither doctor indicated the medical basis for his recommendation or that he had ever been consulted by or had examined or treated the plaintiff for exposure to the chemicals with which plaintiff would be required to work. Other clinical records submitted by plaintiff did not indicate that she needed to be restricted from lab work. Her chest x rays were normal. Her pulmonary function studies were negative for any requirement for restrictions to chemical exposure (Administrative Hearing Record: JtX 131-134, 147-263, 474-496).

The medical and clinical evidence submitted by plaintiff was evaluated by Dr. George H. Smith at the Board hearing and in the trial before his court. His curriculum vitae appears as Defend' [sic] Exhibit 37. The substance of his testimony before the Board appears in Defendant's exhibits 38-47. Dr. Smith's company, G.M. Smith Associates, Inc. is under contract with the Agency to evaluate such medical problems as presented by the plaintiff in this case. His evaluation is summarized in two memos. The first dated August 2, 1987, appears as Defendant's Exhibit 39 and reads as follows:

As you requested I have reviewed the medical documentation submitted by Ms. Maulding in support of excusal of her absence:
-a letter addressed "To whom it may concern" dated April 3, 1987 [sic] and signed by Alvin W. Strauss, Jr., M.D.
No copies of medical office or hospital records were received.
Although Dr. Strauss' letter indicates

that, because Ms. Maulding was exposed to Phosgene [sic] approximately ten years ago, "further exposure to noxious fumes triggers an asthmatic reaction in the patient." However, no reference is made regarding the circumstances under which she has experienced such reactions, the frequency with which they have occurred, the severity and duration of the reactions or the specific substances that have caused the reactions. Without clinical records providing information to this degree of specificity, there is no medical basis upon which to conclude that there is any risk-avoiding or therapeutic value in restricting Ms. Maulding from "laboratory related work" or from any particular laboratory environment at NCTR.

After the intiial evaluation by Dr. Smith, plaintiff submitted statements concerning her exposure to Phosgene while employed at the Rebuke [sic] Company in Louisiana, December 1974. In addition, she related chemical burns sustained while she was in college which necessitated a visit to the emergency room of a Little Rock hospital. Records of this visit were not available.

Plaintiff further related that in approximately 1976 she was working with an

octanol isomer. She dropped in the sink and leaned over to retrieve an item that also fell into the sink and breathed a lung full. It felt as though she had been hit with a hammer in the chest.

In addition to this information provided by the plaintiff, Dr. Lionel Poirier, Director, Division of Comparative Toxicology, provided Dr. Smith with a list of the chemicals to ehich plaintiff would be exposed in the lab. Plaintiff also submitted to Dr. Smith the results of a physical examination at the Family Clinic, Little Rock, Arkansas (DX 46).

Dr. Smith summarized his evalauation of the new data submitted by plaintiff in Defendant's Exhibit 47:

Accordingly, in the absence of clinical records to document the existence of a

medical condition that warrants restriction from specific chemical exposures or documentation that she would be likely to be subject to exposures generally known to be of a hazardous nature in the laboratory to which she would be assigned, there is no medical basis upon which to conclude that there is risk-avoiding to therapeutic value attached to restricting Ms. Maulding from such an assignment. Moreover there is no information to support a conclusion that she would be exposed to allergens in the laboratory to which she would not be exposed elsewhere or that she is likely to suffer injjury or harm by working in the laboratory. As a consequence, therefore, there is no medical basis upon which to reconside rthe reocmmendations of my previous memo or to now recommend approval of her request.

The administrative record on behalf of the agency consisted of primarily of the testimony of Dr. Smith (JtX 229-291) and Dr. Lionel Poirier, Director of the Division of Comparative Toxicology (JtX 293-329). Dr. Poirier came to the NCTR in June of 1987. The mission of the Center had changed, and this division was moved into the field of nutritional toxicology. In accordance with the mission change, Dr.

Poirier felt that it was essential that personnel in his division be committed to lab work. When he spoke to the plaintiff about this shift in the role of the division, she objected to wrking in the lab. (JX 1, p. 294) because of allergies. He asked for documentation to be submitted to Dr. Smith. He provided a list of the chemicals to which she would be exposed, along with a group of pictures which showed the lab environment in which plaintiff would be working. These pictures appear in the record before me as Defendant's Exhibits 9-17 to the testimony of Dr. Poirier. Dr. Poirier declined to change plaintiff's lab assignment on the basis of Dr. Smith's original assessment. In a memo dated April, 1988 he directed her to commence studies in the lab on April 11. He testified as follows;

Q. And why are you directing her at that time?

A. Because on the basis of the information that I received from Doctor Smith there was no basis for medical exclusion. The rest of the laboratory, the rest of the indivduals within the laboratory had gone into the laboratory at that time. She was the only one who was not working in the laboratory environment with the exception of the secretary and I could not give her grounds for exclusion with the memo provided by Doctor Smith.

Plaintiff did not report on April 11, 1988 but on April 13 she requested time to submit additional documentation to Dr. Smith (JX 1, p. 313). Dr. Poirier granted her an 11-day extension to furnish further information to Dr. Smith. During this time she was to read literature on her lab

work. (Id.) After Dr. Poirier received Dr. Smith's second assessement, which is summarized, supra, he again ordered her to report to the lab at 8:00 a.m. on May 11 (JtX 1, p. 315; Px27). She did not report in response to this directive (DX 28). Beginning Monday, May 16, the plaintiff did not report to the Agency or equest leave (DX 34). Dr. Poirier by letter dated June 21, 1988 requested a statement of new intentions (DX 320. On July 15 he advised her by letter that the proposed to remove her from federal service. His charges and specifications were as follows:

The charge of Failure to Follow Written Directions is based on the following specification:
In my June 21, 1988 letter, I directed you to either return to work immediately or notify me by June 28, 1988 of your intention regarding your employment. I also stated that if you failed to contact me or report to work by June 29, 1988 I would initiate action to remove you from the Federal service.
As of the date of this notice you have not

reported for work or made any personal contact with me.
Your failure to comply with my written directions is unacceptable conduct, has hampered the work of this division, and cannot be tolerated. You were clearly warned in the June 21, 1988 letter that failure to comply with my directions would result in initiation of removal proceedings.
The charge of Absence Without Leave (AWOL) is based on the following specification: Since May 16, 1988, through the date of this notice, you have been continuously AWOL for a total of 360 hours.

Plaintiff was actually removed from fedral service by Mr. Arthur Morris, Deputy Director of the NCTR. He testified that she was removed because he was concerned "about getting the job done within Dr. Poireir's division. That for the efficiency of the service, we would have difficulty continuing in the light of that kind of behavior." (JX 1, p. 334). Morris denied that the plaintiff's expressed opposition to the peer review system had any part in the decision to remove her. (JX1, p. 335).

In her testimony at the administrative hearing, plaintiff testified about being exposed in December 1974 to phosgene while working for Rubicon in Louisiana (JX1,pp. 353-355). She also testified about becoming symptomatic when exposed to octanol at NCTR (Id. 355-357). She also testified about becoming symptomatic when exposed to octanol at NCTR (Id. at 357). The exposure occurred while she was working at the Agency from 1976-1980. She was unable to secure medical records on the Louisiana exposure but testified that she consulted Dr. Alvin Strauss, now deceased, about the allergic reactions to the octanol and acetone. His report is in the record and has been alluded to supra. She testified that she consulted Dr. Strauss soon after moving from Louisiana,

which would have been in 1976. (Id. at 357).

Plaintiff testified that she opposed the peer review system and had spoken out at a meeting held on May 13, 1987. She claims that her opposition to the peer review system and her contention that it did not have the required approval of the Office of Personnel Management (OPM) was a factor in her discharge (Id. at 361). This contention was rejected by the ALJ in the initial administrative hearing on Plaintiff's attack of her discharge. On this issue the ALJ was summarily affirmed by the MSPB. (Id. at 609). I agree with the findings and conclusions of the ALJ with regard to the repirsal issue. His [sic] findings and conclusions are set out on pages 557-59 of the record of the administrative hearing. I adopt these

findings and conclusions of law as my own. They were supported by substantial evidence and are not arbitrary, capricious or an abuse of discretion.

The above is a brief summary of the evidence adduced at the administrative hearing. A careful examination of that evidence demonstrates conclusively that the decision of the Merit Systems Protection Board was supported by substantial evidence. It is clear that the Board's decision was neither arbitrary nor capricious nor an abuse of discretion. Plaintiff's non-discriminatory claims must therefore be denied and dismissed. The plaintiff's claim of discrimination will now be considered.

Plaintiff's claim of sex discrimination

Plaintiff's claim of sex discrimination was considered by the administrative law judge and denied (Id. at 559-560). The MSPB affirmed on this issue (Id. at 609). However, the plaintiff is entitled to a trial de novo on the sex discrimination claim.

On the basis of the exhibits and the evidence adduced in the trial before me, I make the following findings of fact.

1. Plaintiff was a member of protected class.

2. She has failed to support her contention that she was treated differently from male employees with regard to leave. Plaintiff alleges that she took eight hours of credit leave on April 11, 1988 without prior approval and was charged AWOL. She states a male staffer took leave without prior approval

on April 15, 1988 and was not charged with AWOL. Plaintiff, however, was taking leave not previously scheduled while the male staffer was taking his normally scheduled day of credit leave and the Agency was already aware he would be absent on that day. Plaintiff also charges that she was charged with AWOL for taking sick leave on April 13 and "other staffers" were not. Plaintiff, however, has failed to prove that male staffers took sick leave without prior approval.

3. Plaintiff claims that a male colleague at his request was not assigned to the lab. However, his situtation is not analogous to that of the plaintiff. Dr. Greenman, a GS-14 senior researcher, was detailed to a position in Dr. Alaben's office in 1989. That position arose because the agency received a directive to complete some studies and was not in

existence in 1988 when plaintiff was removed for her position.

4. All employees in the Division of Comprative Toxicology were offered an opportunity to indicate in what area of nutritional toxicology they were interested in working. Only the plaintiff refused to indicate an area of interest.

5. The plaintiff was a GS-11. The males in her division were GS-13 or GS-14 senior researchers.

6. With regard to the sex discrimination claim, I have applied the formula approved by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). I find that plaintiff has not even made a prima facie case. Assuming she has made such a case, I find that the agency has advanced a legitimate, non-pretextual reason for its personnel actions. Plaintiff has shown no intention on the

part of the defendant to discriminate on the basis of sex and on the whole has failed to sustain her burden of proving sexual discrimination.

Plaintiff's claim of handicap discrimination

Findings of Fact and Concclusions of Law

1. Plaintiff began her employment as a GS-5 chemist at the National Center for Toxicological Research, NCTR, in January, 1976. NCTR is a component of the Food and Drag and Administation, United States Public Health Service, Department of Health and Human Services.

2. From 1976 to late 1980, she worked as a chemist in the laboratory, first in the Teratology division and then in the Chemistry division. She was exposed to solvents on a daily basis. She did not report to her supervisor that she had

experienced any breathing problems from exposure to solvents. She was reassigned from the laboratory in 1980 not beause of a sensitivity problem but because of a disput with her supervisor.

3. Under 29 C.F.R. Sec. 1613.702(a), a handicapped person is defined as one who

(1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

4. "Physical or mental impairment" means (1) any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs' [sic] cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.

29 C.F.R. Sec. 1613.701(b).

5. "Major life activities" means functions, such as caring for one's self, performing manual tasks, walking, seeing,

hearing, speaking, breathing, learning and working. 29 C.F.R. Sec. 1613.702(c).

6. "Has a record of such impairment" means has a history of, or has been classified (or misclassified) as having a mental or physical impairment that substantially limits one or more of major life activities. 29 C.F.R. Sec. 1613.7029d).

7. Under the Rehabilitation Act, the burden is on plaintiff to establish existence of an impairment that substantially limits a major life activity as an element of plaintiff's prima facie case. Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985).

8. The question of whether a person is a handicapped individual authorized to claim relief from discrimination in employment under the Rehabilitation Act centers upon whether the person can establish that he or she has a particular impairment and

whether this impairment constitutes for that particular person a significant barrier to employment. Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986).

9. If an employee establishes that he or she is a "handicapped individual," the employee must then show that he or she is a "qualified handicapped person."

10. "Qualified handicapped person" means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential function of the position in question. 29 C.F.R. Sec. 1613.703(f).

11. I find that plaintiff has failed to establish a sensitivity to chemicals and a history of a substantial limitation upon employability as definded in the above cited federal regulations and cases. In this regard I accept the testimony of Dr. George Smith.

12. I find that she is not a handicapped person within the meaning of 29 C.F.R. SEc. 1613.702(a), supra.

13. To succeed in her claim of handicap discrimination, the plaintiff must first establish that she is an handicapped person within the protection of the Rehabilitation Act. 29 U.S.C. Sec. 791, et seq., Jasany v. United States Postal Service, supra. This she has failed to do.

14. To succeed on her claim of handicap discrimination with respect to her employment at NCTR, plaintiff has the burden of establishing that she is a handicapped person as those terms are defined by the Rehabilitation Act of 1973, as amended, 29 U.S.C. Sec. 701 et seq.

15. As shown in the administrative record, plaintiff cannot meet her threshold burden of establishing that she is an handicapped person. She did not present any documen-

tation to the agency demonstrating that she had a medical condition or a history of a medical condition which caused her significant breathing problems.

16. Where the courts in this Circuit have found an individual to be handicapped, the plaintiff has provided medical documentation to the agency demonstrating that she had a medical condition or a history of a medical condition which cuased her significant breathing problems.

16. Where the courts in this Circuit have found an individual to be handicapped, the plaintiff has provided medical documentation to support that he or she has a handicapping condition. See Norcross v. Snead, 755 F.2d 113 (8th Cir. 1985) (plaintiff presented evidence to establish that she was legally blind); Harrison v. March, 691 F. Supp. 1223, 1229 (W.D. Mo. 1988) (plaintiff presented medical

evidence to demonstrate cancer operation had resulted in severe damage to muscles in arm and shoulder area); Department of Army v. Rhone, 665 F. Supp. 734, 742 (E.D. Mo. 1987) (plaintiff had a documented history of sarcoidosis, a disease affecting the lymphatic, pulmonary and ocular systems).

17. Even if plaintif did present medical evidence to establish an alleged chemical sensitivity, such a condition would not make her a handicapped individual subject to the protection of the Rehabilitation Act. According to the plaintiff, this condition merely prevents her from working in the laboratory. The fact that an individual cannnot perform one particular job, however, does not pose a substanital limitation on employment making that person a handicapped person for the purposes of the Rehabilitation Act.

Forrisi v. Bowen, 794 F.2d 931 (4thCir. 1986); Jasany v. United States Postal Service, 755 F.2d 165 (6th Cir. 1985).

18. Plaintiff is unable to meet the burden of establishing that she is an handicapped person because she cannot establish that she has an impairment or that this impairment has substantially limited her major life activities.

The claim of a Privacy Act violation Finding of Fact and conclusions of law

Plaintiff contends that the Privacy Act was violated. 5 U.S.C. Sec. 552(a) [sic]. She alleges in Count III that as a part of the peer review process, she was required to submit information from her official personnel folder to the peer review panel. She contends that the panel should not have had access to this information under

the Privacy Act. In Count IV of her complaint, she alleges that an employee of the Agency (Dr. Poirier) informed a telephone caller that she was AWOL, thereby violating the Privacy Act. With regard to the Privacy Act claim, I make the following findings of fact and conclusions of law. The first two findings of fact were stiputlated by the parties.

1. In late May or early June, 1988, Dr. Poirier received a telephone call asking if the plaintiff worked in the division of comparative toxicology and if he was her supervisor.

2. Dr. Poirier responded that she did work at NCTR, but was AWOL.

3. The Privacy Act, 5 U.S.C. Sec. 552a, governs conditions for disclosure by an agency or its personnel of certain types of records contained within designated

systems of records maintained by the federal government. 5 U.S.C. Sec. 552a(b).

4. The purpose of the Privacy Act is to preclude these systems of records from being used as a source of personal information about an individual without that individual's prior consent. Olberding v. United States Department of Defense, 709 F.2d 621, 622 (8th Cir. 1983).

5. Only disclosure by the agency or its personnel is actionable. Id.

6. The only disclosure by an agency from a designated system of records which is actionable under the Privacy Act is "one resulting from the retrieval of information initially and directly from records contained in a system of records. . ." Id.

7. An agency may disclose a record from a system of records it maintains, without the individual's prior consent, to those

officers and employees within the agency who have a need for the record in the performance of thier duties. 5 U.S.C. 552a(b)(1).

8. I find no violation of the Privacy Act. It was the plaintiff herself who obtained information from her official personnel file and furnished it to the peer review panel. No member of the peer review committee had access to the plaintiff's personnel file.

9. The information furnished by Dr. Poirier did not violate the Privacy Act. In the first place, it was true and accurate and was information Dr. Poirier was entitled to disclose. The distinction between information retrieved from a system of records and independently acquired has long been recognized under the Privacy Act. Olberding v. Department of Defense, 709 F.2d 621, 622 (8th Cir.

1983); Doyle v. Behan, 670 F.2d 535, 539 (5th Cir. 198?); Jackson v. Veterans Adminstration, 503 F. Supp. 653, 655-57 (N.D. Ill. 1980); Savarese v. U. S. Dept. of Health, Education & Welfare, 479 F. Supp. 304, 307-308. aff'd. 620 F.2d 298(5th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); Thomas v. Department of energy, 719 F.2d 342 (10th Cir. 1983). The disclosure of information derived from an independent source is not prohibited by the statute even though identical information may be contained in an agency system of records. Thomas v. U.S. Department of Energy, 719 F.2d 342 (10th Cir. 1983); Jackson v. Veterans Administration, 503 F. Supp. at 656.

10. In Thomas v. Department of Energy, supra, a supervisor called a meeting to advise employees that their fellow employee, the plaintiff, was to undergo a

psychiatric examination. Based on this disclosure, the plaintiff filed suit under the Privacy Act. The court determined, however, the supervisor did not learn of this information from a system of records but from other sources and dismissed the plaintiff's complaint. The Olberding court stated:

> The interpretation contended for by the plaintiff-that Section 552a(b) is violated if agency personnel disclose information they possess by means other than retrieval from a system of records if they know or have reasonable grounds to know that the information may also be found in a record contained in a system of records-would create an intolerable burden and would expand the Privacy Act beyond its purpose, which is to preclude a system of records from serving as the source of personal information about a person that is then disclosed without that person's prior consent.

Olberding v. Department of Defense, 709 F.2d at 622.

11. Dr. Poirier, as plaintiff's supervisor, was aware of her leave status. It

is obvious from his meorandum concerning the telephone call that he did not go to a system of record to retrieve this information. Plaintiff, therefore, has no cause of action on this allegation under the Privacy Act.

Conclusion

As noted, supra, the review of plaintiff's non-discriminatory claims is very limited. Although the issues before the Merit System Review Board [sic] with regard to the non-discriminatory claim was somewhat close, there was abundant evidence in the record to support the Board's decison. I find no basis for finding that the Board's decision, which is attached hereto as Exhibit A, was arbitrary, capricious or an abuse of discretion. I have tried the claims of plaintiff for sex discrimination

adn handicap discrimination and the Privacy Act claim de novo. Based on the evidence adduced at the trial, I find these claims to be without merit. The case was well tried and fully developed by the capable attorneys. The court appreciates the cooperation with the court and with each other in the presentation of this matter.

Dated this 1st day of July, 1991.

Henry Woods, U.S. Dist. Judge

UNITED STATES OF AMERICA
MERIT SYSTEM PROTECTION BOARD

DIANA M. MAULDING APPELLANT

v. No. DA07528810647

DEPARTMENT OF
HEALTH & HUMAN SERVICES AGENCY

Date: December 18, 1989

Gary Green, Esq., North Little Rock, Arkansas for the appellant

Mary Mitchell Armstrong, Esq., Washington, D.C. for the agency

before: Daniel R. Levinson, Chairman, Maria L. Johnson, Vice Chairman, Samuel W. Bogley, Member

Opinion and order

This case is before the Board upon the agency's petition for review of the January 18, 1989, initial decision, which reversed its action removing the appellant from her position. For the reasons discussed below, the Board grants the agency's petition for review under 5 U.S.C. Sec. 7701(e)(1), affirms the initial decision in its finding that the

appellant failed to show reprisal and discrimination based on sex, reverses the initial decision in its finding that the agency's charges were not sustained and that the appellant established discrimination based on physical handicap, and sustains the appellant's removal.

Background

The agency removed the appellant from her position as pharmacologist based on the charges of failure to follow written instructions and absence without leave (AWOL). See Initial Appeal File, Tab 6, Subtab 34. The charges arose out of the appellant's failure to report for duty in the agency's laboratory (lab) based on her asserted sensitivity to chemicals in the lab, 1 her failure to notify ther supervisor, as requested, of her

intentions regarding her position with the agency, and her unauthorized absence from work from May 16, 1988, until July 15, 1988, the date of the notice of proposed removal. Id at Subtab. 33. The appellant appealed her removal to the Dallas Regional Office of the Board, disputing the charges and raising the affirmative defenses of reprisal for having engaged in alleged protected activities and discrimination based on sex and physical handicap. Id. at tabs 1, 16.

The administrative judge found the agency action not sustained. She found that the appellant properly refused to follow her supervisor's instructions to report to work because her uncontradicted testimony established that she experienced severe respiratory difficulties when exposed to chemicals in the lab. The administrative

judge also found that the agency unreasonably refused to accept the supporting medical documentation the appellant presented.

As to the appellant's affirmative defenses, the administrative judge found that she did not establish reprisal because her opposition to a peer review system, on which she based her repirsal claim, was ot a protected activity under 5 U.S.C. Sec. 2302(b)(8) or Sec. 2303(b)(9). The administrative judge further found that, even if the appellant had shown that she had engaged in a protected activity, she did not show that retaliation was the motivating factor for her reassignment ot lab work. The administrative judge also found that the appellant failed to show sex discrimination because, although she showed that she was a member of a

protected group, she did not present evidence sufficient to show that she was denied leave while male employees similarly situated were granted leave.2

The administrative judge found, however, that the agency discriminated against the appellant based on her physically handicapping condition. In this regard, the administrative judge found that the appellant was a physically handicapped person under 29 C.f.R. Sec. 1613.702(a) because her sensitivity to organic chemicals limited her ability to work. She found that the appellant had identified two positions for which she believed she might have been qualified, and that, although the agency's personnel specialist testified that none of those positions existed at the time of the hearing, the agency did not meet its obligation to

search for a suitable vacancy for the appellant.

In its petition for review, the agency contends, inter alia, that: (1) In accepting as sufficient the appellant's evidence as to her inability to perform, the administrative judge ignored 5 C.F.R.part 339, which places upon the employee the burden of establishing that she was medically restricted in the performance of her duties; (2) the appellant improperly refused the order to report to the lab; and (3) the appellant is not a qualified handicapped individual.

The appellant has responded to the petition for review, asserting the correctness of the initial decision.

Analysis

The appellant did not sustain her burden of proving that she was medically restricted from performing lab work, and accordingly, the agency charges are sustained.

5 C.F.R.part 339 sets forth those circumstances in which an agency may require or offer a medical examination and the procedures for doing so. The applicable regulation, 5 C.F.R. Sec. 339.301(d), provides in pertinent part as follows:

An agency may offer a medical examination when an individual has made a request for medical reasons for a change in duty status, assignment, or working conditions or any other benefit or special treatment . . . and the agency, after it has received and reviewed medical documentation, determines that it cannot

grant, support, or act further on the request without verification of the clinical findings and current clinical status.

This regulation places the burden on the employee to support, with medical evidence, a request for special treatment based on medical reasons. While the regulation permits an agency to offer a medical examination if the employee does not meet this burden, it does not "require" the agency to do so.3

The agency contends that, in finding that the appellant established that she had a medical limitation, the administrative judge erroneously accepted her statement of sensitivity as constituting adequate medical evidence. The agency asserts that, in doing so, the administrative judge apparently relied on the fact that the appellant was unable to obtain the medical records of treatment she allegedly

received for chemical sensitivity, as well as on the testimony of the agency's medical advisor, Dr. George Smith, that he was aware of only one doctor in the country who could peform the required clinical work to test for a sensitivity such as the appellant's. See Petition for Review (PFR) File, Tab 1, PFR at 14 & n.4. The agency further contends that the administrative judge erred in stating that the agency required the appellant to submit clinical documentation only and that the agency, in fact, requested a range of medical evidence, including clinical findings. Id. at 14 n.3. The agency alleges that the appellant did not attempt to locate records of her alleged treatment in the 1970s for chemical sensitivity, and that, although she testified that she could not locate medical records form her present

physician, there was no indication from the physician that such records ever existed. The agency notes that there was no evidence that the appellant advised the agency of health concerns while working in an agency lab from 1976-1980, and that the appellant was reassigned from that lab in 1980 because of difficulties with her supervisor, and not because of medical problems. Id. at 14 n.4.

The administrative judge found, based on the appellant's uncontradicted testimony, that she had a sensitivity to chemicals. The administrative judge considered letters written by two of the appellant's physicians, Drs. Alvin W. Strauss, Jr., and Forrest B. Miller. Dr. Strauss recommended that the appellant refrain from lab work because of her previous reaction to chemicals. See IAF at Tab 6,

Subtab 1. Dr. Strauss's letter related the appellant's history with respect to her exposure to chemicals. His letter was not, however, based on his own examin- ation of the appellant. Dr. Miller also recommended against the appellant's exposure to organic solvents. While Dr. Miller treated the appellant for "severe rhinitis, conjunctivitis and bronchitis," and stated that she was sensitive to organic solvents, he did not treat her for reactions to those solvents. Id. at Subtab 13.

The agency's medical advisor, Dr. Smith, noted, however, that clincial records submitted by the appellant did not show that she should be restricted from lab work. He noted that there was "no data to verify the frequency or intensity of the exposure to which" the appellant had been

subjected in her prior employment, during which she alleged she became aware of her sinsitivity, and that there were "no abnormal clinical findings." Id. at Subtab 20. Dr. Smith also noted that x-rays taken on March 8, 1988, when Dr. Miller saw the appellant, were normal. Dr. Smith furthe pointed out that, although an April 19, 1988, clinical note from the Strauss Clinic "confirm[ed] Ms. Maulding's concern about having a reaction to chemicals," a clinical examination of the same date was negative in regard to any requirement or restriction to chemical exposure. Id. See also IAF at Tab 20.

With regard ot the issue of whether there was an available testing procedure to confirm the appellant's condition, Dr. Strauss stated that he was not aware of anyone who performed "routine pulmonary

function challenges using potentially toxic chemicals" and that, while there were routine tests to induce asthma, use of such toxic chemicals for this purpose would create "some risk " Id., Appellant Exhibit X. He also stated that significant "inhalation of organic solvents to test their effects on pulmonary function . . . would increase risk of pulmonary damage." Id., Appellant's Exhibit Y. Further, Dr. Smith testified that he knw only one doctor nationwide, in Denver, Colorado, who administered chemical sensitivity testing. See Initial Decision at 5-6.

However, in a September 30, 1988 letter, Dr. Jerry Heron, who reviewed the appellant's medical records at the request of Dr. Miller, stated that pulmonary studies perfomed on the appellant on April 13, 1988, "demonstrated normal expiratory

flow rates." Id., Appellant's Exhibit Z. He suggeted "a methacholine challenge test." which, if positive, would have indicated sensitivity "in less than toxic exposures" and would have requried no further "specific testing for chemical reactivity or hypersensitivity." Id. He noted that only if the methacholine challenge test was negative would the appellant's doctors "be faced with the difficult task of proving the presence of a chemical irritant." Id. Dr. Heron did not indicate whether any risks were involved in a methacholine challenge test, and there is no evidence of record to support a finding that the test is dangerous.

We find that the evidence presented by the appellant consisted mostly of her own subjective reports of sensitivity to

chemicals. The medical evidence presented relied on the appellant's own statements of chemical sensitivity or related to other medical problems not germane to such sensitivity. While we agree with the administrative judge that the agency's medical adivorsor should have informed the appellant of the only medical doctor he knew nationwide who performed chemical sensitivity tests, we find that the appellant could have obtianed clinical evidence if she had submitted to a methacholine challenge test as Dr. Heron had recommended to her own physician, Dr. Miller. There is no medical documentation of record indicating that the appellant submitted to such a test. Further, the agency has asserted that the appellant would have been assigned to a position with the least exposure to chemicals, that the agency had "extensive safety

precautions in the lab to prevent exposure to these chemicals," and that the appellant had worked in the lab for four years prior to 1980 with no apparent of documented problem. See PFR at 17-18. The appellant does not challenge these assertions in her response to the petition for review.

Therefore, we find that the appellant has failed to support her allegation that her sensitivity to chemicals warranted her absence from duty. Accordingly, we find that her refusal to report for duty in the lab as directed was improper and sustain that portion of the charge of failure to follow instruction, as well as the AWOL charge. 4 See Proctor v. Equal Employment Opportunity Commission, 27 M.S.P.R. 163, 168-169 (1985 (where an employee fails to show that the work environment does not

place the employee in danger of death or serious injury, the employee's AWOL and refusal to return to work warrant adverse action). See also Haymore v. Department of the Navy, 9 M.S.P.R. 499, 504 (1982) and Parker v. Department of the Interior, 4 M.S.P.R. 97, 100 (1980) (an employee's refusal to obey an order is proper only where the employee shows that obedience would result in death or seious bodily injury).

We note that the administrative judge did not consider the entire charge of failure to follow instructions. A portion of the charge related to the appellant's failure to notify her supervisor by June 28, 1988, of her intentions regarding her employment. The appellant does not assert that she was unable to notify the agency because of medical or other reasons. She

alleges in her response to the petition for review, however, that her attorney contacted the agency, but she does not specify the date of such contact, identify the individual with whom her attorney communicated, or disclose the content of such communication. See Response to Petition for rEview, PFR File at Tab 3. We therefore find that the appellant failed to notify her supervisor of her employment intentions as directed and that this portion of the charge of failure to follow instructions is also sustained.

The appellant failed to prove discrimination based on physical handicap.

Under 29 C.F.R. Sec. 1613.702(a), a handicapped person is defined "as one who: (1) Has a physical or mental impairment which substantially limits one or more of

such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment." Since we have found that the appellant has failed to establish a sensitivity to chemicals and a history of a substantial limitation upon employability, we find that she is not a handicapped person within the meaning of 29 C.F.R. Sec. 1613.702(a). See Forrisi v. Bowen, 794 F.2d 931, 933-34 (4th Cir. 1986) (the Rehabilitation Act covers "truly disabled, but genuinely capable, individuals"). Thus, we find that she has failed to make out a prima facie case of discrimination based on a physical handicap. See Savage v. Department of the Navy, 36 M.S.P.R. 148, 152 (1988), and Stalkfleet v. United States Postal Service, 6 M.S.P.R. 637, 647 (1981) (in order to establish a prima facie case of discrimination based on a

physical handicap, an appellant must prove, inter alia, that he or she is a handicaped person within the meaning of 5 C.F.R. Sec. 1613.702(a)). 5

The penalty of removal was reasonable.

Because we find the agency action sustained, we will address the reasonableness of the penalty imposed. See Douglas v. Veterans Administration, 5 M.S.P.R. 280, 306 (1981) (the Board will review the agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness).

The record shows that, at the time of her removal, the appellant had more than thirteen years of satisfactory government

service, over twelve of which were with the agency. See IAF at Tab 1 and Tab 6, Subtab 33. The record also shows, however, that on May 2, 1988, the appellant's supervisor officially reprimanded her for failing to follow his instructions to report for duty, as well for her AWOL. Id. at Subtab 18. Also, he warned her that her continued failure to provide the requested medical documentation, to notify him of her employment intentions, and to report for work could result in more serious discipline, including removal. Id. at Subtabs 18, 31. Nevertheless, the appellant failed to heed his warnings. The Board has held that removal for failure to follow instructions and /or AWOL may support the efficiency of the service. See Proctor, 27 M.S.P.R. at 168-69 (the penalty of removal for refusing to obey a proper order to return to work after a

period of AWOL was reasonable); Desiderio v. Department of the Navy, 4 M.S.P.R. 84, 85 (1980) (unauthorized absence from dity was held to be proper grounds for removal because of AWOL, by its very nature, disrupts the efficiency of the service). We find, therefore, that removal for the sustained charges was within the tolerable limits of reasonableness.

Order

This is the Board's final order in this appeal. 5 C.F.R. Sec. 1201.113(c).

Notice to Appellant.

You have the right to requst further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your

discrimination claims. See 5 U.S.C. Sec. 7702(b)(1). You must submit your request ot the EEOC at the following address: [address omitted]. You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your represenative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. Sec. 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not requst review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.c. Sec. 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt

of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. Sec. 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, antional origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. Sec. 2000e5(f); 29 U.S.C. Sec. 794a

Other claims: judicial review

If you choose not to seek review of the Board's decison on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Baord's final decision on other issues in your appeal if the court has jurisdiciton. See 5 U.S.C. Sec.

7703(b)(1). You must submit your request to the court at the following address: [omitted]. The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. Sec. 7703(b)(1).

For the board: Robert E. Taylor Clerk of the Board Washington, D.C.

[certificate of service omitted]

footnotes

1 The appellant had worked in an office setting immediately prior to her division's decision in 1988 to shift some of the work emphasis to the lab, to which she was reassigned. See Id. at Tab 6, Subtab 7.

2 We concur in the administrative judge's

findings that the appellant failed to prove that her removal was motivated by reprisal for having engaged in alleged protected activities and by discrimination based on sex. The appellant has not petitioned for review of these findings.

3 In fact, the Board has noted that 5 C.F.R. part 339, which was reviewed by the Office of Personnel Management in 1984, was intended to limit significantly the authority of agencies to order medical examinations for employees in light of previous abuses. See Abatecola v. Veterans Administration, 29 M.S.P.R. 601, 605, aff'd, 802 F.2d 471 (Fed. Cir. 1986) (table); 49 Fed. Reg. 1321 (1984).

4 The initial decision erroneously states that the appellant "was removed for absence without leave (AWOL) from May 16, 1988, thorugh the date of her removal . . . ." Initial Decision at 1, IAF, Tab 23;

See Allen v. Veteran Administration, 38 M.S.P.R. 31, 33(1988) (it is error for an administrative judge to consider in an AWOL charge any period of absence not stated in the proposal notice). The record shows that, with respect to the AWOL charge, the agency relied only on the period stated in the proposal notice, May 16, 1988, to July 15, 1988, in removing the appellant. However, the administrative judge's adjudicatory error was not prejudicial to the appellant's substantive rights and, therefore, does not warrant reversal of the initial decision based on that error. See Panter v. Department of the Air Force, 22 M.S.P.R. 281, 282 (1984).

5 Since we have found no discrimination by the agency based on physical handicap, we need not address the agency's contention that the Board "should reject" the holding

in Ignacio v. United States Postal Service, 30 M.S.P.R. 471, 486-87 (Spec. Pan. 1986), that an agency is required to consider reassignment as a reasonable accommodation of a qualified handicapped employee. See PFR at 21-22.

92-762

Supreme Court, U.S.
FILED
AUG 3 1992
OFFICE OF THE CLERK

No. _____

UNITED STATES SUPREME COURT

October 1992 TERM

DIANA M. MAULDING Petitioner

v.

LOUIS W. SULLIVAN, Secretary of Department of Health and Human Services; DEPARTMENT OF HEALTH AND HUMAN SERVICES Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

APPENDIX PETITION FOR WRIT OF CERTIORARI
VOL. 2 OF 2

Diana M. Maulding
Petitioner
1406 Ivy Chapel Road
Little Rock, AR 72206

501-888-7180

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

DIANA M. MAULDING APPELLANT

v. No. DA07528810647

DEPARTMENT OF HEALTH
AND HUMAN SERVICES AGENCY

Gary Green, Esq. North Little Rock, Arkansas, for the appellant

Mary M. Armstrong, Esq. Washington, D.C. for the agency

Before: Rebecca D. Westfall, Administrative Judge

Initial Decision

Diana L. Maulding filed a timely appeal from the agency's action removing her from her position as a pharmacologist, GS-11, Division of Comparative Toxicology, at the Food and Drug Administration's (FDA) National Center for Toxicological Research (NCTR), effective August 27, 1988. The Board has jurisdiction over this appeal. 5 U.S.C. Secs. 7511-7513.

Based on the following analysis and findings, the agency's action is REVERSED.

ANALYSIS AND FINDINGS

The appellant was removed for absence without leave (AWOL) from May 16, 1988, through the date of her removal and for failure to follow the written instructions of her immediate supervisor, Dr. Lionel A. Poirier, to return to work or to contact him by June 28, 1988. A decision of an agency to remove an employee shall be sustained by the Board only if the agency's decision is supported by a preponderance of the evidence. 5 U.S.C. Sec. 7701(c)(1)(B). 1

The appellant may properly refuse to perform her assigned tasks if she

reasonably believes that she is in danger of imminent serious bodily injury.

It is undisputed that the appellant never reported for work from May 16, 1988, until the effective date of her removal. The appellant refused to return to work at the NCTR because as of May 11, 1988, Poirier had ordered her to report to work in a laboratory setting to begin receiving training in cell culture research. The appellant testified that she refused to go into the lab because she is extremely sensitive to organic solvents, such as acetone and acetate, which are present in the NCTR's lab to which the appellant was reassigned. See appeal file, tab 6, subtab 5. According to the appellant, her exposure to even small amounts of these substances has left her with severe respiratory problems. These include

experiencing a smothering sensation, wheezing, yawning, and labored breathing which can last for weeks after an exposure to an organic chemical solvent or compound.

The appellant testified that her difficulties began in 1974, while working at Rubicon chemicals in Geismer, Louisiana, when she inhaled phosgene gas. Thereafter for many weeks, she had difficulty breathing. The appellant was employed with NCTR in 1976 and worked in a lab in another division. Approximately a year later, the appellant suffered similar respiratory problems when she inadvertently inhaled octanol. At that time she first realized that she had an unusual sensitivity to volatile organic chemicals or solvents because her symptoms were identical to those which she

experienced in 1974. Her physician, Dr. Alvin W. Strauss, Jr., urged her to avoid all orgainc solvents and compounds. Strauss was concerned that further exposure could cause her to stop breathing altogether. The appellant added that, even with the protective equipment and ventilation available in the lab, where she worked before 1980, she experienced more respiratory problems due to exposure to organic solvents such as acetate. Many of these incidents involved the actions of other workers when using the chemicals, over which the appellant had no control.

It is well established as a general principle of labor law applicable to the private sector that an employee may refuse to obey insstructions from a supervisor to perform an assigned task, if she reasonably believes that to do so would

place her in a clearly dangerous situation. Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980). While this Supreme Court decision was not directly applicable to the federal sector, the Board has assumed that federal employees are protected by the same concept. Haymore v. Department of the Navy, 9 M.S.P.R. 499, 504 (1982); Parker v. Department of the Interior, 4 M.S.P.R. 97, 100 (1980).

Based on the appellant's uncontradicted testimony, I find that she experiences severe respiratory problems when exposed to certain organic chemicals found in the lab environment to which she was reassigned on May 11, 1988. Thus, the next question to be resolved is whether the agency unreasonably rejected the appellant's medical documentation as being

insufficient to show that her condition warranted her restriction from the lab.

Because the agency's insistence that the appellant supply clinical medical evidence that she was medically restricted from performing her assigned duties was unreasonable, the charges may not be sustained.

Since 1980, when the appellant transferred into the Comparative Toxicology Division, the appellant has performed written review work which was done in an office setting. Poirier testified that even before he became the Division's Director in 1987, the employees, including the appellant (2), had been made aware that the Division would be undergoing a change in emphasis, from written review work to "bench type" laboratory research.

In Janurary 1988, the appellant requested agency approval of an outside activity and approximately twenty hours of leave without pay per week so that she could take a job as a law clerk. The appellant made this request in anticipation that she would be assigned lab work which she could not perform because of her sensitivity to organic chemicals and solvents. See appeal file, tab 6, subtab 2.

Poirier denied this request and asked the appellant to submit medical information which would be reviewed by the FDA's physician so that the agency could determine whether the apellant's medical condition warranted restriction from lab work. See appeal file, tab 6, subtab 3. Poirier requested, inter alia, the results of clinical tests or other diagnostic

procedures showing exactly what substances she needed to avoid, the results of clinical tests explaining the minimal levels likely to cause injury to the appellant, whether her condition was controllable with medication or other treatment, and whether her condition was static or was likely to become worse.

The medical statements which the appellant presented to the agency were historical in nature and related the appellant's subjective history of the severe respiratory problems which developed after her initial exposure to phosgene and her other exposures. Two of the appellant's doctors recommended that she be restricted from lab work. See appeal file, tab 6, subtabs 1 and 13. The appellant also provided a detailed history of her sensitivity to the chemical found in the

NCTR's lab to the FDA's consulting doctor, Dr. George M. Smith. See appeal file, tab 20, the agency's hearing exhibit 4.

Smith testified that he is a contract employee with the FDA. As the agency's consulting physician, Smith reviews medical records submitted by FDA employees, when the agency is contemplating some personnel action based on an employee's medical condition. 3 In accordance with 5 C.F.R. Secs. 339.101-.304, Smith found that the medical information submitted by the appellant was insufficient to demonstrate that she needed to be restricted from lab work, because it was completely historical in nature and based on the appellant's subjective sysptoms. Smith testified that he did not doubt that the appellant and her doctors believed that she had a

medical condition. However, he stated that without the results of clinical testing, which demonstrated the scientific existence of the medical condition, he could not find that the appellant should be restricted from working in the lab.

After Smith initially found that the medical evidence which she had submitted was inadequate, the appellant made extensive efforts to get the objective clinical evidence necessry. However, because her first negative exposure happened in 1974, she was unable to obtain the records of her medical treatment. Thereafter, she contacted several physicians trying to find someone who could, in conformity with acceptable medical procedure, administer an objective medical test which would document her sensitivities to the organic compounds.

None of the physicians she contacted knew of any medically acceptable clinical procedure, such as a pulmonary challenge test, which could be done with potentially toxic chemicals, and thereby provide the documentation Smith required. See the appeal file, tab 20, the appellant's hearing exhibits, X, Y, Z.

On cross-examination Smith was asked if he knew of any doctor who could perform the required clinical tests to test for a sensitivity such as the appellant's. Smith replied that he kne of one physician in the entire country who could perform these tests. According to Smith, Dr. John Selner, an allergist practicing in Denver, Colorado, has been able to perform tests for chemical sensitivities through the use of specially designed chambers. Smith knew of no physician in Arkansas who could

perform similar tests. It is undisputed that before the hearing, Smith had not informed either the appellant or any of her representatives about Selner.

Under the cricumstances of this case, however, I find that it would be a violation of fundamental fairness to expect the appellant to produce clinical medical evidence to support request that she not be reassigned to lab work. Accordingly, I find the agency unreasonably rejected the appellant's medical evidence which clearly demonstated that she has an unusual sensitivity to organic chemicals and solvents found in the lab to which she had been assigned. The agency's charges are therefore not sustained.

The appellant did not prove that the agency engaged in reprisal.

Even though I have not sustained the agency's charges against the appellant, the Board requires that the administrative judge address all of the material issues raised in the appellant's appeal, including claims of reprisal and discrimination. Jones v. Department of the Navy, 36 M.S.P.R. 593, 597 (1988); Grate v. Department of the Army, 33 M.S.P.R. 156, 158 (1987). On appeal, the appellant raises three affirmative defenses. These are that (1) the agency's action in assigning her to the lab was in reprisal for the appellant's engaging in the protected activities of objecting to a new peer review system at NCTR and seeking the intervention of the Office of Personnel Management to stop its

implementation during the summer of 1987, (2) the agency discriminated against the appellant on the basis of her sex, and (3) the agency discriminated against her on the basis of her handicapping condition of extreme sensitivity to organic solvents.

Irrespective of the merits of an agency's case, a decision to remove an employee will not be sustained by the Board if the appellant demonstrates that the decison to remove her was based on a prohibited personnel practice, such as discrimination or reprisal. 5 U.S.C. Sec. 7701(c)(2)(B). The appellant bears the burden of proving all of her affirmative defenses by preponderant evidence. 5 C.F.R. Sec. 1201.56(a)(2)(iii) (1988); Savage v. Department of the Navy, 36 M.S.P.R. 148, 151 (1988).

In order to show reprisal, the appellant must demonstrate that she engaged in a protected activity, that the deciding official knew of her activity, that this adverse action could under the circumstances have been retaliation, and that there was genuine nexus between the retaliation and the action taken. Warren v. Department of the Army, 804 F.2d 654 (1986); Gomez v. Department of Justice, 36 M.S.P.R. 56, 60 (1988). The protected activity must be shown by a preponderance of the evidence to have been the motivating factor or real reason for the agency's action. See Gerlack v. Federal Trade Commission, 9 M.S.P.R. 268 (1981). If it is shown that unlawful retaliation played a substantial role in the agency's decision to take the adverse action, the agency must then show by preponderant evidence that it would have taken the same

action even if the protected activity had not occurred. Id.

It is undispouted that the appellant was assigned to report to the lab approximatly eleven months after she first spoke out in a meeting at the NCTR against the proposed peer review system and ten months after she unsuccessfully sought intervention by OPM in this matter. On review of the activities engaged in by the appellant, I find that they are not covered by the provisions of either 5 U.S.C. Sec. 2302(b)(8) or (b)(9). Moreover, even if the appellant had proven that she had engaged in protected activities in opposing the peer review system, she still would not prevail on this affirmative defense because I find no evidence that the appellant's conduct in opposing the peer review system was the motivating

factor for her reassignment o lab work. As I have previously found, the agency had contemplated a return to bench type lab work for all of the employees in the appellant's division as early as 1985. Therefore, I find that the appellant has failed to show by preponderant evidence that the agency's motivation in reassigning her to the lab was predominately retaliatory or that the agency's asserted reasons for reassigning her to lab work were pretextual. Accordingly, I find that the appellant's first affirmative defense must fail.

The appellant did not prove that the agency discriminated against her because of her sex.

In reviewing an allegation of discrimination, the Board has adopted the

test for the allocation of the burden of proof established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See, e.g., Davis v. Department of Commerce, 28 M.S.P.R. 535, 537-38 (1985). Under McDonnell Douglas, the appellant has the burden of establishing a prima facie case of discrimination. She may meet this burden by showing that (1) she is a member of a protected class; (2) she is similarly situated to an individual who is not a member of her protected group; and (3) she was treated more harshly or disparately than the individual who is not a member of his protected group. The appellant must also show that the different treatment is based upon an intent to discriminate, which may be shown by circumstantial evidence. See Fenn v. Department of the Army, 35 M.S.P.R. 362, 366 (1987).

If the appellant establishes a prima facie case of discrimination, the burden of going forward with the evidence shifts to the agency to articulate a legitimate, non-discriminatory reason for its different treatment of the appellant. McDonnell Douglas, at 802; Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the agency meets its burden, the appellant must show that the stated reason is merely a pretext for discrimination. Id.; Fenn at 367.

To support her claim of discrimination on the basis of sex, the appellant alleges that on one occasion when she requested sick leave, it was denied and she was charged with AWOL, while male staff members in her division were granted sick

leave. She also alleges that on one occasion she was denied credit leave because she had failed to obtain her supervisor's prior approval, while a male co-worker, who has also failed to receive prior supervisor approval, was granted the credit leave.

The record reflects that the appellant was a member of a protected group. However, with regard to her first allegation concerning the denial of sick leave, I find she has not presented any evidence to support her claim that similarly situated male employees were granted sick leave.

With regard to her claim that she was treated disparately regarding credit leave, I find that the documentary evidence introduced by the appellant fails to support her allegation. For example,

although the appellant has introduced documentary evidence to show that she was marked AWOL during the pay period ending April 23, 1988, I find that it is not possible to tell whether this AWOL is attributable to a denial of sick leave or credit leave. See appeal file, tab 20, the appellant's hearing exhibits GG and HH. Moreover, none of the leave slips denying her credit hours support the appellant's assertion that her request for credit hours was denied because she had failed to obtain previous supervisory approval. See appeal file, tab 20, the appellant's hearing exhibits OO, KK, and PP. 4 Finally, I note that even if the documentary evidence showed that the appellant was denied credit leave because of her failure to obtain prior approval, the agency had a legitimate reason for the disparate treatment afforded that male

co-worker. Unlke the appellant who was working five days a week, and, therefore should have been familiar with the change in policy, the male co-worker regularly worked only four days and may have not have been aware of the new policy. See appeal file, tab 20, the appellant's hearing exhibit II. Thus, I find that the appellant has failed to support her second affirmative defense by preponderant evidence and it too must fail.

The appellant is a handicapped individual.

As her third affirmative defense, the appellant alleged that the agency discriminated against her because of her handicapping condition. The appellant argued that the agency should have accommodated her handicapping condition by seeking to reassign her to a job within

her physical limitations for which she was qualified. To establish a prima facie case of discrimination on the basis of a handicapping condition, the appellant must show that: (1) she is a qualified handicapped person 5 pursuant to 29 C.F.R. Sec. 1613.702(a) and (f) (1987), (2) the agency action appealed to the Board was based on her handicap, (3) the appellant has, to the extent possible, articulated a "reasonable accommodation" under which she believes that she could perform the essential duties of her position or of a vacant poistion to which she could be reassigned, and (4) the agency has failed to reasonably accommodate her handicapping condition. If an employee is a qualified handicapped person, then the agency is required to provide reasonable accommodation for the handicap, unless it can demonstrate that to do so would

require substantial modification of the position or that to do so would impose an undue hardship on the operations of its program. Savage at 152-53; Stalkfleet v. U.S. Postal Service, 6 M.S.P.R. 637, 648 (1981). Moreover, reassignment to another position must be considered as a reasonable accommodation for a qualifed handicapped person. Ignacio v. U.S. Postal Service, 30 M.S.P.R. 471, 486-87 (Spec. Pan. 1986).

On review of the record, I find that the appellant's sensitivity to organic solvents so limits her ability to work in a laboratory situation that she is a physically handicapped individual as defined by regulation 29 C.F.R. Sec. 1613.702(a) (1988). I further find that as early as April 12, 1988, the appellant articulated a reasonable accommodation for

her handicapping condition when she first formally requested to be reassigned to another position. See appeal file, tab 20, the appellant's hearing exhibit "BB." The record reflects that the appellant has a wide variety of job skills in addition to her experinece as chemist. These include accounting, research and writing, data reduction, and some clerical skills. Additionally, the appellant has recently earned a law degree.

Neither the applicable anti-discrimination regulations nor the Board's precedent require an agency to create a position for an otherwise qualified handicapped employee. The required accommodation is reassignment ot a vacant position for which the appellant could perform the job's essential functions, with or without

accommodation. McLean v. Department of the Army, 36 M.S.P.R. 405, 408 (1988).

On review of the testimony given by Poirier, Norris, and Dick L. King, an FDA Personnel Specialist assgned to the NCTR, it appears that no effort was made to accommodate the appellant's handicapping condition by way of reassignment. The appellant tetified about two vacant positions which she believed existed at NCTR and for which she might be qualfied. She identified these positions as being the Center's Archivist and Special Staff Assistant to the Director. The appellant's testimony about these two positions was very general and was obviously not based on her review of any current vacancy announcements or position descriptions. King denied that either position identified by the appellant currently

exists. From the testimony given by King and Norris, it appears that the work of maintaining the archives was assigned to a GS-4 clerical employee and that the NCTR's Director had not been able to formally establish the position of Special Staff Assistant.

While King was certain neither of the two positions named by the appellant existed, he could not recall specifically whether there had been any vacancies for which the appellant was qualified at the Center between May 1988 and the time of the hearing. King indicated that such vacancies could have existed.

On review of the evidence of record, I find that although the agency had an obligation to conduct a search for a position into which the appellant could be

lawfully reassigned, it failed to do so. I further find that the agency offered no proof as to why conducting such a search or reassigning the appellant to a suitable vacancy, if one had existed or currently exists, would cause undue harship on its operation. I find, therefore, that the apppellant has satisfied her burden of establishing a prima facie case of handicap discrimination which the agnecy has failed to rebut.

Decision

The agency's action is REVERSED

ORDER

The agency is ORDERED to cancel the appellant's removal and to retroactively accommodate her handicapping condition by

conducting a search of all vacancies which have existed at NCTR since April 12, 1988, and, if possible, by placing the appellant into a vacant position for which she quialifies which is consistent with her medical restrictions. This action must be accomplished no later than sixty calendar days afer the date this initial decision becomes final.

The agency is also ORDERED to issue a check to the appellant for the appropriate amount of back pay and benefits in accordance with the office of Personnel Management's regulations, no later than sixty calendar days after the date this initial decision becomes final. The appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary informaiton

requested by the agency in furtherance of compliance.

If there is dispute about the amount of back pay due, the agency is ORDERED to issue a check to the appellant for the undisputed amount no later than sixty calendar days after the date this initial decision becomes final. The appellant may then file a petition for enforcement with this office concerning the disputed amount.

The agency is further ORDERED to inform the appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, the appellant should ask the agency about its intentions.

For the Board: Rebecca D. Westfall, Administrative Judge

NOTICE TO APPELLANT

This initial decision will be come final on February 22, 1989, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition,

you must file it within the proper time period.

Board Review

You may request Board review of this initial decision by filing a petition for review. Your petition for review must satate your objections to the initial decision, supported by references to applicable law, regulations, and the record. You must file your petitiion with: [address omitted]. Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than thirty calendar days after the date this initial decision becomes final. The address of the EEOC is: [address omitted].

JUDICIAL REVIEW

If you do not want to file apetition with the EEOC, you may ask for judicial review of both discrimination and non-discrimination issues by filing a petition with the appropriate United States District Court no later than thirty calendar days after the date this initial decision becomes final.

If you choose not to contest the Board's decision on discrimination, you may ask for judical review of the nondiscrimination issues by filing a petition with: [address omitted]. You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be received by the court of appeals no later than thirty calendar days after the date this initial decision becomes final.

ATTORNEY FEES

If no petitiion for review is filed, you may ask for the payment of attorney fees by filing a motion with this office no later than twenty calendar days after the date this initial decision becomes final.

ENFORCEMENT

If, after the agency has informed you that it has complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a motion with this office no later than thirty calendar days after the date of the agency's notification of compliance.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

[certificate of service omitted]

footnotes

1. A preponderance of the evidence is that degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. Sec. 1202.56(c)(2) (1988).

2. The record reflects that as early as April 5, 1985, Strauss had written a letter in the appellant's behalf recommending that she not be reassigned to the lab. See appeal file, tab 6, subtab 1.

3. Smith has a background in public sector health and between 1977 and March 1983, he was OPM's National Medical Director. During this time he helped to develop the regulations found at 5 C.F.R. Secs. 339.101-.304 which govern the type

of medical evidence required before a personnel action can be taken based on a medical condition.

4. The appellant's request for credit hours was denied because her supervisor found that she had priority work which was not being accomplished.

5 A handicapped person is one who has a physical or mental impairment which substantially limits one or more of her major life activities, such as performing manual tasks, walking and working. 29 C.F.R. Secs. 1613.702(a) and (c) (1988). A qualfied handicapped person is one who, with or without accommodation, can perform all of the essential functions of a position without endangering herself or others. 29 C.F.R. Sec. 1613.702(f) (1988).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DIANA M. MAULDING APPELLANT

v. No. 91-2747EALR

LOUIS W. SULLIVAN, head
of Department of Health &
Human Services; Department
of Health & Human Services APPELLEES

Appeal from the United States District
Court fo the Eastern District of Missouri
[sic]

Appellant's Pro Se petition for rehearing
has been considered by the court and is
denied.

May 5, 1992

Order entered at the direction of the
court: Michael E. Gans, clerk

CODE PROVISIONS

5 U.S.C. Sec. 7703(c)

In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

5 U.S.C. Sec. 7702(d)(1)

If the Board takes any action under subsection (c)(2) of this section, the matter shall be immediately certified to a special panel described in paragraph (6) of this subsection. Upon certification, the Board shall, within 5 days (excluding Saturdays, Sundays, and holidays), transmit to the special panel the administrative record in the proceeding, including-

(A) the factual record compiled under this section,

(B) the decisions issued by the Board and the Commission under this section, and

(C) any transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

5 C.F.R. Ch. II (1-1-88 Ed.) Sec. 1201.3

Appellate jurisdiction; Definition and application.

(a) Appellate jurisdiction generally. The Board has jurisdiction over appeals from agency actions when the appeal is autorized by law, rule, or regulation. This appellate jurisdiction includes: . . .(2) Removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service. (5 CFR Part 752, Subparts C and D; 5 U.S.C. 7512); . . . .

5 C.F.R. Ch. II (1-1-88 Ed.) Sec. 1201.111

Initial decision by presiding official.

(a) The presiding official shall prepare an initial decision after the closing of the record. Such initial decision shall be immediately transmitted to the Clerk of

the Board, to the Director of OPM, and to all parties to the appeal, including named parties and intervenors, whether permissive or of right.

(b) Each initial decision sahll contain:

(1) Findings of fact and conclusions of law, as well as the reasons or bases therefor, upon all the material issues of fact and law presented on the record;

(2) An order as to the final disposition of the case, including appropriate relief;

(3) The date upon which the decision will become final, which, for purposes of this section, shall be 35 days after issuance; and

(4) A statement of any further process available, including, as appropriate; petition for enforcement under Sec. 1201.182, petition for review under Sec. 1201.114 and judicial review.

5 C.F.R. Ch. II (1-1-88 Ed.) Sec. 1201.113

Finality of decision

The initial decision of the presiding official shall become final 35 days after issuance. Such decisions are not precedential. . . .

(b) Petition for review denied. If the Board denies allpetitions for review, the initial decision shall become final upon the issuance of the last denial.

(c) Petition for review ganted or case reopened. If the Board grants a petition for review or a cross petition for review, reopens or dismises a case, the decision of the Board shall be the final decision unless otherwise specified therein. . . .

5 C.F.R. Ch. II (1-1-88 Ed.) Sec. 1201.114(a)

Who may file. Any party to the preoceeding, the Director of OPM, or the

Special Counsel may file a petition for review. . . .

Purpose and applicability.

(a) Purpose. This subpart sets forth the policy under which an agency shall establish a continuing program to assure nondiscrimination on acccount of physical or mental handicap and the regulations under which an agency will process complaints of discrimination based on a physical or mental handicap.

(b) Applicability. (1) This subpart applies to executive agencies as defined in section 105 of Title 5 of the United States Code and to those positions in the legislative and judicial branches of the Federal Government and the government of the District of Columbia which are in the competitive service. (2) This subpart applies to the U.S. Postal Service and Postal Rate Commission. (3) This subpart applies only to applicants and employees

who have a handicap as defined in Sec. 1613.702(a).

Sec. 1613.702 Definitions

(a) "Handicapped person" is defined for this subpart as one who: (1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) or has a record of such an impairment, or (3) is regarded as having such an impairment.

(b) "Physical or mental impairment" means (1) any physilogical disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental pr

psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(c) "Major life activities" means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(d) "Has a record of such an impairment" means has a history of, or has been classified (or misclassified) as having a mental or physical impairment that substantially limits one or more major life activities.

(e) "Is regarded as having such an impairment" means (1) has a physical or mental impairment that does not

substantially limit major life activities but is treated by an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; (3) or has none of the impairments defined in (b) of this section but is treated by an employer as having such an impairment.

(f) "Qualfied handicapped person" means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used: (1) Meets the experience and/or education requirements

(which may include passing a written test of the position in question, or (2) meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

Sec. 1613.703 General policy

Agencies shall give full consideration to the hiring, placement , and advancement of qualified mentally physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualfied physically or mentally handicapped person.

Sec. 1613.704 Reasonable accommodation

(a) An agency shall make reasonable accommodation to the known physical or

mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examination, the provision of readers and interpreters, and other similar action.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of the agency in

question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

Sec. 1613.705 Employment criteria

[omitted]

Sec. 1613.706 Preemployment inquiries

[omitted]

[43 FR 12295, Mar. 24, 1976. Redesignated at 43 FR 60901, Dec. 29, 2978, and amended at 46 FR 11285, Feb. 6, 1981]

28 U.S.C. Sec. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final dcisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiciton of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

5 U.S.C. Sec. 552a Records maintained on individuals

[Section 552a is voluminous; only relevant parts are printed.]

(a) Definitions. --For purposes of this section--

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol,

or other identifying particular assigned to the individual, such as a finger or voice print or a phtograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

[(6) and (7) omitted.]

5 U.S.C. Sec. 552a(e) Agency requirements.--Each agency that maintains a system of records shall--

[(1) through (2) and (4) through (8) and (11) omitted as not relevant to this issue]

(3) inform each indivdual whom it asks to supply information, on the form which it uses to collect the information or on a

separate form that can be retained by the individual--

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information; . . . . [next section begins]

5 U.S.C. Sec. 552a(e)(9)

establish rules of conduct for persons

involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and [(11) omitted.]

5 U.S.C. Sec. 552a(g)(1) Civil remedies.--Whenever any agency [(A) through (C) omitted, not relevant] (D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

[(2)(A) omitted]

(2)(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

[(3) omitted]

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines taht the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought

in the district court of the United States in the district in which the complainant resides, . . . without regard to the amount in controversy, within two years from the date on which the cause of action arises . . . .

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Supreme Court, U.S.
FILED
JAN 11 1993
OFFICE OF THE CLERK

No. 92-762

In the Supreme Court of the United States

OCTOBER TERM, 1992

DIANA M. MAULDING, PETITIONER

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below erred in reviewing the final decision of the Merit Systems Protection Board under the "arbitrary and capricious" standard.

2. Whether the courts below overlooked credibility determinations made by the ALJ.

3. Whether the courts below erred in concluding that petitioner did not sustain her burden of showing that she was handicapped within the meaning of the Rehabilitation Act.

4. Whether the court of appeals erred in not explicitly addressing petitioner's Privacy Act claims.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-762

DIANA M. MAULDING, PETITIONER

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 961 F.2d 694. The opinion of the district court (Pet. App. 29-63) is not reported. The opinion of the Merit Systems Protection Board (Pet. App. 64-91) is reported at 42 M.S.P.R. 605. The opinion of the administrative law judge (Pet. App. 92-151) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1992. A petition for rehearing was denied on May 5, 1992. The petition for a writ of certiorari was

filed on August 3, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The National Center for Toxicological Research, a division of the Public Health Service within the Department of Health and Human Services, terminated petitioner's employment on August 27, 1988. The Merit Systems Protection Board (MSPB) sustained the termination. Pet. App. 64-91. Petitioner filed a complaint in the United States District Court for the Eastern District of Arkansas seeking to reverse that decision. The district court upheld the MSPB's decision. *Id.* at 29-63. The court of appeals affirmed. *Id.* at 1-28.

1. Petitioner began her employment with the Public Health Service in 1976. Pet. App. 2. She worked as a laboratory chemist from 1976 until December 1980. *Id.* at 2-3. In 1980, she was assigned to a pharmacology position in the Office of Scientific Intelligence, which later became part of the Division of Comparative Toxicology. *Id.* at 3. In this new position, petitioner worked in an office rather than a laboratory. *Ibid.*

When Dr. Lionell Poirier became Director of the Division of Comparative Toxicology in early 1987, he spoke to each member of his staff regarding the Division's transition from "paper" research to laboratory research. Pet. App. 3. When Dr. Poirier spoke with petitioner, petitioner said she would not work in the laboratory because of an alleged allergy to certain chemicals. *Id.* at 3-4. Petitioner had never complained to her supervisors about breathing or pulmonary

problems during the more than four years she had worked as a chemist in a laboratory. *Id.* at 3.

Persisting in her claim that health considerations prevented her from doing laboratory work, petitioner in early 1988 requested part-time work outside the laboratory. Pet. App. 4. Dr. Poirier denied her request in February 1988, at which time he asked petitioner to produce specific and current information about her alleged allergies that would support her request to be excused from laboratory work. *Id.* at 4-5. Dr. Poirier informed petitioner that, pursuant to the regulations of the Office of Personnel Management, her request would be reviewed by Dr. George Smith, the agency's medical advisor. *Id.* at 5.

Petitioner submitted a 1985 letter from Dr. Alvin Strauss recommending she not be assigned to the laboratory; the letter was not accompanied by any documentary explanation for his recommendation. Pet. App. 5, 25 n.2. Petitioner also submitted a memorandum prepared by Dr. Poirier listing the chemical compounds that might be present in the laboratory. *Id.* at 5-6. After reviewing these documents, Dr. Smith concluded in a March 25, 1988, memorandum that "without clinical records to document the existence of a medical condition that warrants restriction from specific chemical exposure, and documentation that such exposures are likely to occur * * * there is no medical basis upon which to recommend approval of her request." *Id.* at 6-7.

On April 8, 1988, Dr. Poirier assigned petitioner to work in the laboratory, but petitioner did not report as requested. Pet. App. 7. Dr. Poirier again directed petitioner to report to the assigned laboratory job on

April 13, 1988. *Ibid.* Petitioner reported to work for about two hours but did not enter the laboratory. *Ibid.* Accordingly, Dr. Poirier charged her with absence without leave for two days because petitioner had no approved excuse for her absence from the laboratory. *Id.* at 7-8.

Dr. Smith then granted petitioner's request for more time to supply medical documentation supporting her health claims. Pet. App. 8. After reviewing additional information provided by petitioner, Dr. Smith again determined that the records did not sufficiently indicate petitioner had any lung or respiratory ailment other than the allergies she had always had. *Id.* at 9. Dr. Smith reiterated that petitioner failed to carry her burden. *Ibid.*

Dr. Poirier directed petitioner to report to the laboratory on May 11, 1988, and again petitioner refused. Pet. App. 9. Beginning May 16, 1988, petitioner neither reported for work nor requested leave. *Ibid.* On June 21, 1988, Dr. Poirier wrote petitioner and asked her to notify him by June 28, 1988, of her intentions with respect to her assigned job. *Id.* at 9-10. Petitioner did not respond, and on July 15, 1988, Dr. Poirier informed petitioner that he proposed to remove her from federal service. *Id.* at 10. Petitioner was notified of her right to respond but failed to do so. *Ibid.* The Deputy Director of the National Center for Toxicological Research then notified petitioner of her removal, effective August 27, 1988, for failure to follow written instructions and for absence without leave. *Ibid.*

2. On September 20, 1988, petitioner appealed her removal to the Merit Systems Protection Board

(MSPB), alleging that the agency constructively discharged her. Pet. App. 10. Petitioner also argued that she was fired in retaliation for whistleblowing, see 5 U.S.C. 2302(b)(8)-(9); on account of her gender, see 5 U.S.C. 2302(b)(1)(A); and on account of her alleged handicap, see 5 U.S.C. 2302(b)(1)(D). Pet. App. 10-11. The administrative law judge (ALJ) rejected petitioner's claims that the discharge was in retaliation for whistleblowing or on account of gender. *Id.* at 109, 114. The ALJ reversed the agency's decision to discharge petitioner, however, because: (1) the agency's insistence on receiving clinical medical evidence to support petitioner's request to be relieved of lab work (as required by 5 C.F.R. 339.101) was "a violation of fundamental fairness"; and (2) petitioner was handicapped within the meaning of the Rehabilitation Act, 29 U.S.C. 706, and the agency had failed to reasonably accommodate her handicap. Pet. App. 104, 120.

3. The agency appealed and the Board found in its favor. Pet. App. 12. The Board found that petitioner's absence from duty was not justified; that petitioner had not met her burden under 5 C.F.R. 339.101 to provide adequate medical documentation that would excuse her from laboratory work; and that petitioner was not handicapped under the Rehabilitation Act. Pet. App. 12.

4. Petitioner filed a complaint in the district court for the Eastern District of Arkansas seeking to overturn the MSPB's decision. Pet. App. 12, 30. The district court concluded that the Board's decision that petitioner was properly dismissed for absence from duty was "neither arbitrary nor capricious nor

an abuse of discretion" and "was supported by substantial evidence." *Id.* at 45. The district court found that the decision that petitioner was not dismissed in retaliation for whistleblowing was "supported by substantial evidence and * * * not arbitrary, capricious or an abuse of discretion." *Id.* at 44-45. Engaging in *de novo* review, *id.* at 46, the court found that petitioner "has shown no intention on the part of the defendant to discriminate on the basis of sex." *Id.* at 48-49. As to petitioner's handicap discrimination claim, the court found that petitioner "has failed to establish a sensitivity to chemicals." *Id.* at 52. Thus, the district court found that "she is not a handicapped person within the meaning of 29 C.F.R. Sec. 1613.702(a)." *Id.* at 53. Finally, the court rejected petitioner's allegation that the Privacy Act was violated because she was required to submit personal information to support her claim and because Dr. Poirier informed a caller seeking petitioner that she was "AWOL." *Id.* at 56-62. The court thus upheld the MSPB's decision.

5. The court of appeals affirmed. Pet. App. 1-28. With respect to petitioner's claims that the termination was unjustified and in retaliation for whistleblowing, the court of appeals concluded that the MSPB's decision "was neither arbitrary nor capricious nor an abuse of discretion" and "agree[d] with the district court that 'the decision of the Board was supported by substantial evidence.' " *Id.* at 20 (quoting *id.* at 45). The court concluded that petitioner "supplied insufficient evidence of sex discrimination under Title VII" and found "no clear error in the district court's conclusion in this regard." *Id.* at 13.

The court further concluded that "it was not error to reject [petitioner's] claim of handicap discrimination on the basis of failure to carry the burden of proof." *Id.* at 18.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore not warranted.

1. Petitioner argues (Pet. 27-39) that the courts below erred in reviewing the final decision of the MSPB rather than the action of the employing agency, HHS. The courts properly reviewed the MSPB's decision. Section 7703 of Title 5 is entitled "Judicial review of decisions of the Merit Systems Protection Board" and provides for judicial review of "a final order or decision of the Merit Systems Protection Board." Section 7703(c) provides the standard for judicial review of MSPB decisions. Petitioner correctly notes that Section 7703(c) mentions "agency action," but the language and structure of the provision—which provides for judicial review of MSPB decisions—make clear that the "agency" to which Section 7703(c) refers is the MSPB.

Petitioner's underlying concern seems to be that courts, by reviewing MSPB decisions, will allow agency employment decisions to evade judicial review. See Pet. 30-31. That concern is misplaced. To analyze an MSPB decision, the reviewing court will, of course, have to examine the record and the agency employment decision in question to determine the propriety of the MSPB decision. This case is a good

illustration. In reviewing the MSPB's decision, the courts below extensively examined the facts underlying petitioner's termination to determine whether the MSPB's decision should be affirmed. See Pet. App. 19-24; *id.* at 31-45.

Petitioner also argues (Pet. 30-31, 40-43) that the courts below erred by reviewing the final decision of the MSPB instead of the ALJ's decision. But, as noted above, 5 U.S.C. 7703(a)(1) provides for judicial review of "a *final* order or decision of the Merit Systems Protection Board" (emphasis added). The decision by the Board itself, not the decision of the ALJ, is the final decision of the MSPB.

2. Relying on *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), petitioner contends that the courts below improperly overlooked the ALJ's factual findings. There is no merit to that contention.

In *Universal Camera*, this Court held that the factual findings of a Board examiner, and not only those of the Board as a whole, may be considered by the reviewing court. 340 U.S. at 496-497. In reaching that conclusion, the Court reasoned that review under the "substantial evidence" standard requires the reviewing court to consider the examiner's findings where credibility is the crucial issue. In this case, however, the Board's reversal of the ALJ's decision turned on its assessment of the adequacy of the medical evidence petitioner submitted to her supervisors concerning her alleged allergies. See Pet. App. 70-79. Thus, the issue was not a matter of credibility; the sole issue was whether the documentation petitioner submitted was sufficient to establish the alleged medical condition.

3. Petitioner contends (Pet. 45-47) that the district court and the court of appeals erred in concluding that she did not sustain her burden of showing she was handicapped. The Rehabilitation Act requires petitioner to demonstrate that she "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. 706(8)(B)(i)-(iii).[1] The district court and the court of appeals correctly stated that the initial burden is on the claimant to show the existence of a handicap. See *Jasany* v. *United States Postal Service*, 755 F.2d 1244, 1248 (6th Cir. 1985); see also *Gilbert* v. *Frank*, 949 F.2d 637, 640 (2d Cir. 1991); *Forrisi* v. *Bowen*, 794 F.2d 931, 933 (4th Cir. 1986); cf. *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-253 (1981).

The courts below properly concluded that petitioner failed to meet her burden. Pet. App. 18, 52. Petitioner never submitted appropriate medical documentation to show that she was sensitive to chemicals (and thus had a physical "impairment") to the agency, the ALJ, the Board, or the courts. As the Board concluded: "[T]he evidence presented by [petitioner] consisted mostly of her own subjective reports of sensitivity to chemicals. The medical

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[1] Petitioner claims (Pet. 45-47) that the lower courts ignored the second and third prongs of the Rehabilitation Act's definition. But petitioner tendered evidence to show that she *had* a physical impairment, not that she had a record of having such an impairment or that she was regarded as having such an impairment.

evidence presented relied on [petitioner's] own statements of chemical sensitivity or related to other medical problems not germane to such sensitivity." *Id.* at 77-78. The Board, the district court, and the court of appeals all correctly concluded that the evidence submitted by petitioner was insufficient to satisfy her threshold burden of showing she was sensitive to chemicals and thus handicapped. *Id.* at 18, 52, 78-79.[2]

Petitioner also contends (Pet. 43-44), relying on *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980), that the court of appeals should have determined whether her refusal to perform laboratory work was "reasonable," not whether it was justified by medical evidence. In our view, her refusal was unreasonable because it was not justified by medical evidence. Moreover, *Whirlpool*, a case involving the Occupational Safety and Health Act, has little apparent relevance to petitioner's Rehabilitation Act claim.

4. Petitioner argues that a "fair reading of [28 U.S.C.] 1291 is that the entirety of the final decision [of the district court] is before the Court of Appeals and the Court of Appeals must address all issues within that final decision." Pet. 49. Petitioner contends she was denied the review mandated by

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[2] Moreover, as the court of appeals stated, petitioner's alleged ailment "would prevent her only from lab work, and * * * such a limitation does not substantially limit her employment as a whole." Pet. App. 17-18; see *Byrne* v. *Board of Education*, No. 91-1113 (7th Cir. Nov. 10, 1992), slip op. 8 ("It is well established that an inability to perform a particular job for a particular employer is not sufficient to establish a handicap; the impairment must substantially limit employment generally.").

Section 1291 insofar as the court of appeals did not explicitly address her Privacy Act claims. The district court analyzed and rejected those claims, Pet. App. 56-62, and its findings are supported by the record. In its opinions, the courts of appeals need not explicitly discuss every issue raised by an appellant. The fact that the court of appeals in this case found petitioner's Privacy Act claims even less meritorious than her other claims, and therefore rejected them without discussion, does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1993

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER 1992 TERM

DIANA M. MAULDING PETITIONER

v. No. 92-762

LOUIS W. SULLIVAN, Secretary
of Department of Health and
Human Services; DEPARTMENT
OF HEALTH AND HUMAN SERVICES
RESPONDENTS

Reply to Respondents' Brief in Opposition
to Petitioner's Petition for a Writ of
Certiorari

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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1201.3 8

Petitioner takes issue with the following arguments raised in the brief in opposition

**Brief in opposition p. 7

"The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals."

a. The district court and the court of appeals did NOT follow a decision of this court nor federal law. Department of Navy v. Egan, 108 S. Ct. 818 (1988) is virtually a clone fact pattern to the instant case and clearly shows that it is the employing agency's decision that the MSPB is to review and develope an evidentiary record while doing the review. Then, the district court examines that record to determine if the employing agency's decision was in

accordance with 5 U.S.C. Sec. 7703(c). Neither the district court nor the court of appeals in the instant case followed Egan; both looked only at the final MSPB decision in the context of 7703(c) and they should have looked at the WHOLE RECORD, of which the final decision is only a part and assuredly not part of the evidentiary record at that. Petitioner never worked for the MSPB, DHHS was the employing agency.

b. Respondents do not cite to any authority that there is no conflict between the circuits as to whether judicial review after a case goes through the MSPB is of the MSPB decision or the employing agency's actions toward the employee for the excellent reason there is no authority to support this argument. Petitioner stands by her cites.

c. The MSPB ALJ made credibility based findings of fact. The full Board disagreed without good reason and simply supplanted its views for those of the ALJ in this area. The district court and the court of appeals erred in not following the holding in Universal Camera Corp. v. N.L.R.B., 71 S. Ct. 456 (1951).

d. The court of appeals erred when it changed the standard in Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980) from reasonable to justifiable. Whirlpool Corp. held that an employee may refuse to perform a work assignment if the employee has a reasonable fear for his safety or life. "Justifiable" is different from reasonable.

**Brief in opposition, p. 8 "In reviewing the MSPB's decision, the courts below extensively examined the facts underlying petitioner's termination to determine

whether the MSPB's decision should be affirmed."

This is not true. From the post-hearing MSPB brief forward, the Respondents have made claims that were picked up by both the district court and court of appeals as facts substantiated by the record. Petitioner pointed out that these "facts" were not in the record in a motion and brief devoted soley to this issue to the district court and also the "facts" were brought to the court of appeals' attention but clearly neither court checked the evidentiary record because those "facts" developed a life of their own completely independent of the record.

For example, the Respondents note that Petitioner never contacted the agency after she left May 13, 1988 as a result of what Petitioner contends was a

constructive termination on that date. (Brief in Opp. p. 4) If the Respondents or either court had ever checked the record, they would have discovered two letters from Petitioner and one from her attorney, all written after May 13, 1988, and all with some sort of receipt notation on the face thereof that had been made BY THE AGENCY. The list of such "facts" went on for several pages the first time it was presented to the district court.

The statement made by the Respondents in their brief in opposition contains no less than seven of these "facts" after only a cursory review. These "facts" must be critical to the courts and the agency or they would not have appeared with such regularity below.

Brief in Opposition, page 8.

"Petitioner also argues that the courts below erred by reviewing the final decision of the MSPB instead of the ALJ's decision."

Apparently Petitioner was not clear. Neither the ALJ's nor the final MSPB decision are reviewed under 5 U.S.C. Sec. 7703(c). The evidentiary record created by the MSPB adjudicatory process is reviewed as it memorializes the employing agency's actions. The term "evidentiary record" is defined by regulation. 5 C.F.R. Sec. 1201.54. It is the employing agency's actions that the district court should judicially review. "Agency" in 5 U.S.C. Sec. 7703(c) means the agency that took the action which resulted in the trip to the MSPB then on to court. The MSPB is itself reviewing, for lack of a better word, the employing agency's action. 5 C.F.R. Sec. 1201.3.

**Brief in opposition, p. 8

"'[T]he Board's reversal of the AlJ's decision turned on its assessment of the adequacy of the medical evidence petitioner submitted to her supervisors concerning her alleged allergies' and not the ALJ's credibility findings."

Again, no. The ALJ found Petitioner credible when Petitioner testified that she had the solvent-induced breathing problem and produced all the available medical records and the 1985 Dr. Strauss letter. The Dr.Strauss letter in the record was the agency's copy as it had their receipt marks on it.

The ALJ found that Petitioner had met her burden on the medical records as the agency had not just asked for medical records nor asked Petitioner to undergo tests of the agency's choosing at the hands of a doctor of the agency's

choosing in order for Petitioner to avoid the lab assignment. The agency, charged with stamping out medical quackery and fraud, had its medical advisor Dr. Smith devise only-one-doctor-in-the-U.S.-does them medical tests request in July 1987, scarcely a month after Petitioner had turned the agency in to OPM over the Peer Review. The medical records issue related exclusively to the constructive termination charge, initially, then later became an issue in the handicapping claim. The ALJ found that the burden of production had been met by Petitioner when Petitioner testified and put into evidence without objection by the agency an affidavit by Dr. Mark Strauss to the effect that he had never heard of the inhalational toxicity or challenge tests the agency asked Petitioner to produce.

These were the only tests the agency would accept and as the existence and name of the one U. S. doctor who did them was revealed by the agency at the mid-December 1988 MSPB hearing, the ALJ held it was reasonable for Petitioner to not be able to produce them at the agency's demand back in the spring of 1988.

Bluntly restated, the ALJ did not believe the agency's position that the tests were readily available and Petitioner could have had them done if Petitioner had chosen to do so. The district court and court of appeals erred when they did not follow Universal Camera and set aside the ALJ's credibility findings.

**Brief in opposition, p. 9 Handicap argument, particularly the footnote.

Petitioner put on, without objection by the agency, proof that Petitioner had had the solvent-induced breathing problem from 1974 forward although Petitioner was not aware it was life-threatening until 1985 when she got the letter from Dr. Strauss. Both the letter and the content of the discussion was relayed to the agency. Petitioner put on a record of having an impairment. Further, by its actions in rescinding the 1985 lab assignment, the agency certainly regarded Petitioner as having the impairment, i.e. lung problems brought on by the 1974 phosgene exposure.

There was abundant proof in the record for the district court and court of appeals to find that Petitioner had met two of the three disjunctively set out basis in the handicapping law and only one had to be met if all

were joined by "or." Handicapping is provable by more than just medical records, according to the code, and certainly provable without having to undergo tests that only one U.S. doctor may or may not do.

**Brief in Opposition, p. 10.

Respondents somehow confuse Whirlpool Corp. v. Marshall, 445 U.S.1 (1980) as having something to do with the handicap claim. Not so. This ties is directly with the constructive termination claim raised before the MSPB and it was the ALJ that pointed out that an employee cannot be terminated for having a reasonable fear of performing a task at work.

Respondents also mistakenly state five years into this case on p. 10 that Petitioner was fired for refusing to go into the labs. Again, not so. Petitioner was cut to 8 hours in an office per week,

the balance to be in the labs or AWOL unless Petitioner could produce the only-one-doctor-does-them test results. Obviously, Petitioner could not produce the results. This cut was made May 13, 1988.

Petitioner left May 13, 1988 to find another job. The agency left Petitioner on the payroll system and logged all time from May 13, 1988 forward as AWOL. This AWOL, which spanned the greater part of the summer of 1988, was one basis for termination. The second basis was a failure to communicate with the agency after May 13, 1988 and in the teeth of letters to the contrary bearing receipt marks placed thereon by the agency, the agency held that it had not heard from Petitioner from May 13, 1988 forward. Those letters are in the evidentiary record of the MSPB and that

in turn was an evidentiary exhibit before the district court.

Basically, the agency just wanted a whistleblower who had turned them in to OPM over Peer Review gone. Petitioner had 13 years of good to excellent performance appraisals. Petitioner was not an employee likely to create cause for her dismissal so in stepped the agency with its one-Denver-doctor-does-them-but-we-won't-tell-her-that medical test request. In the process of this devious little plan, the agency contravened the handicapping discrimination code and others not on appeal.

**Brief in opposition, p. 10-11, Privacy Act claims.

There is absolutely nothing in the record that detracted from any of the proofs on the Privacy Act claim. The agency sat placidly through the district

court trial as evidence was introduced to establish that not only did the requested information fit the Privacy Act but the form used to request the protected information did not comply with the Privacy Act.

If courts of appeals can pick and choose what claims they will hear, that is an impermissable assumption of the power of certiorari; it is a rewriting of the Constitution which gives only the United States Supreme Court the discretion as to which otherwise jurisdictionally correct appeals it hears. May it hear this one.

Respectfully submitted,

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